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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2068

W. TURTON THOMPSON,

Petitioner

vs.

MEDICAL LICENSING BOARD OF INDIANA AND ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, AND EDWARD L. HOLLENBERG, INDIVIDUALLY AND AS MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, SECOND DISTRICT

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W. Turton Thompson prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Court of Appeals, Second District, entered April 25, 1979, as amended by that court's opinion denying the petition for rehearing entered December 26, 1979.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Indiana Court of Appeals properly applied Indiana law, rather than federal law, to a cause of action brought pursuant to 42 U. S. C. § 1983 to impose on plaintiff a requirement that he exhaust Indiana administrative remedies, even though the court acknowledged that exhaustion may not have been required if the same plaintiff had brought the same action in federal court?

2. Whether plaintiff is required to exhaust Indiana administrative remedies before proceeding under 42 U. S. C. § 1983 if he challenges both the constitutionality of the statute he is charged with violating and the constitutionality and impartiality of the procedure and hearing which he will be required to exhaust?

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The opinion of the Indiana Court of Appeals, entered April 25, 1979, is reported at 389 N. E. 2d 43 (Ind. App. 1979). The opinion of the Court of Appeals denying the petition for rehearing, entered December 26, 1979, appears at 398 N. E. 2d 679 (Ind. App. 1979). Copies of these opinions are set out in the Appendix A5 and A2, respectively. The notice from the Indiana Supreme Court denying transfer is unpublished but appears in the Appendix at A1.

JURISDICTION

The judgment of the Indiana Court of Appeals was entered April 25, 1979. A petition for rehearing in that Court was filed on May 11, 1979, within the twenty-day time limit for such petitions under Rule 11(A) of the Indiana Rules of Appellate Procedure. The petition for rehearing was denied by an opinion of the Indiana Court of Appeals issued December 26, 1979. Petition for transfer to the Indiana Supreme Court was filed on January 4, 1980, within the twenty-day time limit for such petition under Rule 11(B)(4) of the Indiana Rules of Appellate Procedure. The Indiana Supreme Court denied transfer on April 3, 1980, with no opinion being issued by that court.

The judgment of the Indiana Court of Appeals is a final judgment within the meaning of 28 U. S. C. § 1257. The denial of transfer by the Indiana Supreme Court, although not signifying that court's approval of the Court of Appeals reasoning, has the legal effect of terminating the litigation between the parties. Rule 11(B)(4) of the Indiana Rules of Appellate Procedure; *United States Steel Corporation* v. *Dykes*, 238 Ind. 599, 154 N. E. 2d 111 (1958).

Cases which supports the finality of the judgment, and the jurisdiction of this Court, are *American Motorists Insurance Company* v. *Starnes*, 425 U. S. 637 (1976), *United States of America* v. *Gilbert Associates, Inc.*, 345 U. S. 361

(1953) and *Chicago & Eastern Illinois Railroad Company* v. *Industrial Commission of Illinois*, 284 U. S. 296 (1932).

This action was commenced in the Superior Court for Marion County, Indiana, Room No. 7, pursuant to 42 U. S. C. § 1983.[1] The complaint was dismissed for failure to exhaust administrative remedies before the Indiana Medical Licensing Board, a decision affirmed on appeal with the Indiana Court of Appeals applying Indiana law to impose on plaintiff a state law exhaustion requirement, even though plaintiff was bringing suit pursuant to a federal statute. The case, therefore, presents federal questions regarding the propriety of applying state law to an action brought pursuant to 42 U. S. C. § 1983 and the necessity, under the circumstances of this case, of exhausting state administrative remedies before proceeding pursuant to 42 U. S. C. § 1983.

STATUTES INVOLVED

The statutes involved in this case are 42 U.S.C. §§ 1983 and 1988 which are set out in the Appendix, A43.

STATEMENT OF THE CASE

This case started in October 23, 1975, when the Indiana Medical Licensing Board (the "Board") instituted disciplinary proceedings against Dr. Turton W. Thompson ("Thompson"), charging him with violations of IC 25-22.5-6-2(5) and (6), which provide:[2]

> To promote uniformity among the several states and territories and to provide guidelines for physicians and the board, the following charges will be

1. The complaint also sought declaratory and injunctive relief under the Indiana Uniform Declaratory Judgment Act, IC 34-4-10 *et seq.* A copy of the Verified Complaint appears in the Appendix, A29-43.

2. A copy of the complete charge is attached as Exhibit "A" to Thompson's Verified Complaint and may be found in the Appendix, A40-41.

> grounds for probation of a licensee or susupension or revocation of a license:
>
> * * *
>
> (5) Except as otherwise permitted by law, to knowingly prescribe, sell or administer any drug classified as a narcotic, addicting or dangerous drug to a habitue or addict;
>
> (6) Willful or wanton misconduct or manifest incapacity in the practice of medicine or osteopathic medicine.

Thompson is alleged to have violated this statute by providing prescription drugs to female patients in return for sexual favors. The Board's charge against Thompson alleged he had violated IC 25-22.5-6-2(5) and (6) by:

> 1. Illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2(5), Chapter 6 of Acts 1975, Public Law 271. [IC 25-22.5-6-2-(5).]
>
> 2. Committing willful and wanton misconduct in the practice of medicine by illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2(6), Chapter 6 of Acts 1975, Public Law 271. [IC 25-22.5-6-2(6)]

Thompson believed the charge against him was constitutionally defective because the Board had not promulgated or adopted any rules defining or identifying those drugs classified as "narcotic", "addicting" or "dangerous", thereby bringing within the definition of said terms, as contained in IC 25-22.5-6-2(5), drugs of every type and description, nor had the Board promulgated or adopted

any rules or regulations which define "habitue" or "addict" as those terms are used in IC 25-22.5-5-6-2(5). Additionally, the Board had not charged Dr. Thompson with prescribing any drug classified as a narcotic, addicting or dangerous drug *to a "habitue or addict."* Finally, the Board had not promulgated or adopted any rules or regulations which define or specify the elements of "wilfull or wanton misconduct" as these terms are used in IC 25-22.5-6-2(6), thereby bringing within the scope and ambit of this statutory provision every type of action and activity.[3]

The Board chose to proceed against Thompson by scheduling an administrative disciplinary hearing for Thursday, February 12, 1976, commencing at 9:00 a.m. This hearing would be before the Board which includes as its members five (5) physicians, one (1) osteopathic physician, and one (1) chiropractor. Thompson believed that this hearing would be constitutionally defective because one of Board members who would judge Thompson, Dr. Kopecky, was the party who signed the charge against Thompson. Based on this fact, and other information Thompson believed had been shown to the Board, Thompson did not think the Board would provide a fair and impartial hearing. In addition, the members of the Board are not attorneys, and Thompson feared that the Board was not capable or competent to make judicial determinations on the basis of legal arguments which he intended to raise before the Board.

Convinced that both the statute he was charged with violating and the hearing procedures of the Board were con-

3. Pursuant to IC 25-22.5-2-7(a) and (c), the Board is required to promulgate rules and regulations to enforce the provisions of IC 25-22.5-6-2 and 25-22.5-6-3. The Board, however, has chosen to incorporate by reference other separate statutory provisions which arguably describe "narcotic", "addicting", and "dangerous" drugs. In his state court complaint, Thompson alleged the statutes were vague and overbroad and that the incorporation of other statutes is an improper and unlawful incorporation and a wrongful delegation of authority by the Board.

stitutionally defective, and fearful of the damage to his professional reputation which could result from the continuation of the Board procedures, Thompson brought suit to restrain the Board.

The case was commenced in the Marion Superior Court, Room Seven, on February 11, 1976 seeking injunctive and declaratory relief against the Board pursuant to 42 U. S. C. § 1983 and certain Indiana statutes. Thompson sought to restrain the Board from initiating the administrative proceedings against him.

On June 14, 1976, Judge Zore of Marion Superior Court, Room Seven, granted the Board's motion to dismiss the complaint on the grounds that Thompson, by failing to proceed with the Board disciplinary hearing, had failed to exhaust state administrative remedies.[4] The relevant portion of Judge Zore's order provided:

> ORDERED that defendants' motion to dismiss be, and is hereby, GRANTED upon the ground that the plaintiff has failed to exhaust his administrative remedies before the Medical Licensing Board of Indiana. Accordingly, it is the judgment of this Court that plaintiff's verified complaint be, and is hereby, DISMISSED, each party to bear its own costs in the action.

Thompson perfected an appeal from this decision and the trial court, pursuant to Thompson's motion, granted an injunction and stay of any Board action pending appeal. Thompson preserved his federal question to the requirement of exhausting administrative remedies before proceeding under 42 U. S. C. § 1983, in his "Motion to Correct Errors filed July 26, 1976.[5]

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4. Judge Zore's order is in the Appendix, A27-8.

5. The motion to correct errors is the procedural device required by Rule 59 of the Indiana Rules of Trial Procedure to preserve errors for appellate review. *P-M Gas & Wash. Co., Inc.* v. *Smith*, 375 N. E. 2d 592 (Ind. 1978). Thompson's motion to correct errors is set out in the Appendix, A22-A26.

On April 25, 1979, the Indiana Court of Appeals, Second District, affirmed the dismissal of the complaint in an opinion reported at 389 N. E. 2d 43 (A5). This opinion held that judicial review of administrative decisions under the Indiana Administrative Adjudication Act, IC 4-22-1, provided the exclusive means to obtain judicial relief from the Indiana administrative process and that exhaustion of any administrative proceedings was required prior to seeking judicial relief. The opinion, however, did not address the issue, raised by Thompson in his brief, that exhaustion of state administrative remedies was not required in a suit brought pursuant to 42 U. S. C. § 1983.

On May 11, 1979, Thompson petitioned the Court of Appeals for rehearing, raising as the basis for this petition the failure of the Court of Appeals to address the issue of exhaustion under 42 U. S. C. § 1983. The Court of Appeals denied this petition, in an opinion dated December 26, 1979, and reported at 398 N. E. 2d 679, (A2), holding, in relevant part, as follows (emphasis in original):

> Thompson points to the general rule that exhaustion of state administrative remedies is not a prerequisite to bringing a § 1983 action in a federal court. *Damico* v. *California* (1967), 389 U. S. 416, 88 S. Ct. 526, 19 L. Ed. 2d 647; *McNeese* v. *Board of Education* (1963), 373 U. S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622; *Snyder* v. *Altman* (D. C. Cal. 1978), 444 F. Supp. 1269; *Kahn* v. *Shainswit* (D. C. N. Y. 1976), 414 F. Supp. 1064. Thompson then concludes, "Applying the federal decisions in § 1983 actions, it is clear that exhaustion of administrative remedies is not required in the case at bar."
>
> The fatal flaw in this argument is that these federal decisions *are not applicable.*
>
> The procedural rule set out by the courts above addresses only actions brought in federal court. No case cited by Thompson, nor any which we have been able to locate, demands that a state court abandon

its own requirements of exhaustion merely because the claim before it is based upon § 1983.

Language in the federal decisions so indicates. In *Snyder* v. *Altman, supra,* the court stated:

> The general rule is that there is no need to exhaust possible state remedies before pursuing a civil rights action *in federal court.* (emphasis supplied)

444 F. Supp. at 1270.

Likewise, the court in *Kahn* v. *Shainswit, supra,* remarked:

> [Our decision] does not violate the general rule that *a federal litigant* need not exhaust state remedies in a § 1983 action. (emphasis supplied).

414 F. Supp. at 1068.

Thus we repeat, a state court does not undergo a metamorphosis into a federal court merely because it must decide a § 1983 suit. No matter what the nature of the action before an Indiana state court, it remains a state court. As Gertrude Stein observed, a "rose is a rose is a rose is a rose." Our rules of trial procedure and evidence still apply. So does our requirement of exhaustion.

If Thompson desired the benefit of federal procedures, he should have brought his suit in federal court.

Thompson sought transfer of his case to the Indiana Supreme Court by petition dated January 4, 1980. This petition was denied on April 3, 1980, terminating the litigation between the parties in the Indiana courts.

WHY THE WRIT SHOULD BE GRANTED

1. The opinion below erroneously applies Indiana law, rather than federal law, to an action brought pursuant to 42 U. S. C. § 1983.

In 1871, Congress passed § 1 of the Ku Klux Klan Act of 1871, 42 U. S. C. § 1983, creating a federal statutory

cause of action to enforce the guarantees of the United States Constitution. The legislative history and purpose of this act has been extensively discussed in previous decisions of this Court and will not be repeated here. *See, e.g., Monnell* v. *Department of Social Services of the City of New York,* 436 U. S. 658 (1978); *Adickes* v. *S. H. Kress and Co.,* 398 U. S. 144 (1970) (all opinions); and *McNeese* v. *Board of Education for Community Unit School District 187,* 373 U.S. 668 (1963) (hereinafter "McNeese").

Although Congress vested the federal courts with jurisdiction to hear claims arising under § 1983,[6] this grant of jurisdiction was not exclusive and did not deprive state courts of jurisdiction over these actions. Consequently, state and federal courts have concurrent jurisdiction over lawsuits alleging § 1983 violations. *Dowd Box Company* v. *Courtney,* 368 U. S. 502, 508 (1962). In fact, the state courts are required by the Supremacy Clause of the United States Constitution (art. VI, cl. 2) to exercise jurisdiction over § 1983 claims and to enforce the rights arising from that statute. *Testa* v. *Katt,* 330 U. S. 386 (1947).

The Indiana Court of Appeals recognized its concurrent jurisdiction over § 1983 claims. 398 N. E. 2d at 680, A2. It erroneously chose, however, to apply Indiana case law requiring exhaustion of administrative remedies to the § 1983 claim. Although the court acknowledged that exhaustion of administrative remedies was not normally a requirement if a § 1983 action were brought in federal court, it refused to follow that rule because, according to the court, it was a state court, not a federal court.

The Indiana Court of Appeals' decision to look solely to Indiana law to determine whether Thompson was required to exhaust administrative remedies before proceeding under § 1983 was simply wrong. The meaning and application of

6. 28 U.S.C. §§ 1331 and 1343.

a federal statute is for this Court to decide and that decision binds the state courts. *United States of America* v. *Gilbert Associates, Inc.*, 345 U. S. 361 (1953).

Starting with the *McNeese* decision in 1963, this Court has on at least six occasions rejected attempts to require plaintiffs suing under § 1983 to exhaust state administrative remedies.[7] In fact, as explained *infra*, pp. 16-18, this Court's decision in *Gibson* v. *Berryhill*, 411 U. S. 564 (1973) refused to apply the exhaustion requirement in a case virtually identical to the case at bar. This Court has, therefore, held that exhaustion is not required under the facts of this case, a holding which the court below did not consider, let alone follow. This Court's interpretation of § 1983, however, cannot be ignored and binds state courts faced with a § 1983 claim. *United States of America* v. *Gilbert Associates, supra.*

This does not mean that state law plays no role in cases arising under § 1983. 42 U. S. C. § 1988 specifically directs state law be used to "fill the interstices of federal law." *Moor* v. *County of Alameda*, 411 U. S. 693, 701 (1973). Two recent decisions of this Court have emphasized the vitality of § 1988 and state law in a § 1983 action. *Board of Regents of the University of the State of New York* v. *Tomanio*, — U. S. —, 48 U. S. L. W. 4556 (May 19, 1980) and *Robertson* v. *Wegmann*, 436 U. S. 584 (1978).

Yet neither § 1988 nor *Tomanio* or *Robertson* turns a § 1983 action into a diversity case where *only* state law applies. The rule of law applied in a § 1983 case, "whether drawn from federal or state sources, is a *federal rule* responsive to the need whenever a federal right is impaired." *Sullivan* v. *Little Hunting Park*, 396 U. S. 229,

7. In addition to *McNeese*, this Court has considered exhaustion of state administrative remedies in the context of a § 1983 suit in *Barry* v. *Barchi*, 443 U.S. 55 (1979); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *Wilwording* v. *Sevenson*, 404 U.S. 249 (1971); *Houghton* v. *Shafer*, 392 U.S. 639 (1968); and *Damico* v. *California*, 389 U.S. 416 (1967).

240 (1969). This "federal rule," however developed, governs § 1983 actions whether brought in a federal or a state court. *McNeese* and its progeny are the source of the federal rule which governs this case and it was not necessary or proper for the Indiana Court of Appeals to apply Indiana law to Thompson's claim.[8]

The Indiana Court of Appeals, however, never considered whether federal or state law applied to Thompson's complaint nor did it meaningfully weigh the decisions of this Court regarding the exhaustion requirement under § 1983. Instead, the Indiana court blindly applied Indiana law to Thompson's claim, disregarding federal precedent because it found "these federal decisions *are not applicable.*"[9] (emphasis in original).

This Court's decisions under a federal statute may not be so easily brushed aside. When this Court speaks to matters of federal law and federal statutes, its commands must be observed by both federal and state courts. As demonstrated below, this Court has relieved § 1983 plaintiffs of the exhaustion requirement in cases similar to this. This disregard of *Gibson* v. *Berryhill,* 411 U.S. 564 (1973), and other decisions of this Court by the Indiana Court of Appeals is clear error which should be corrected before it spawns precedent in other state courts which will eventually displace those courts as effective forums for the vindication of the rights secured under § 1983.[10] The decision of the

8. 42 U. S. C. § 1988 requires resort to state law only when the laws of the United States are "deficient." Therefore, the decisions of this Court regarding the necessity of exhausting administrative remedies in a § 1983 action must be applied by both federal and state courts. These decisions obviate any need to resort to state law.

9. Among the federal decisions which the Indiana Court of Appeals found inapplicable were this Court's decisions in *Damico* v. *California,* 389 U.S. 416 (1967) and *McNeese.* 398 N. E. 2d at 680, A3.

10. Unless state courts are recognized and maintained as effective forums for § 1983 litigation, cases under this section will continue to flood the federal courts. Although Thompson has been unable to determine how many § 1983 cases have been filed in federal courts, it is interesting to

Indiana Court of Appeals to apply state law to Thompson's claim is clear error and the writ should issue to correct that error.

2. A Plaintiff Who Alleges Bias in the Proposed Administrative Proceedings Is Not Required to Exhaust Those Proceedings Before Bringing Suit Under § 1983.

This Court has never required a plaintiff to exhaust administrative remedies before proceeding under 42 U. S. C. § 1983 and, in fact, two members of this Court have stated exhaustion is never required before instituting suit under § 1983. *Gibson* v. *Berryhill,* 411 U. S. 564, 581 (1973) (Marshall, J. and Brennan, J., concurring).[11] Resolution of this case, however, does not require this Court to decide whether a § 1983 plaintiff may ever be forced to exhaust state administrative remedies prior to court action. Rather, disposition of this case is governed, and reversal of the Indiana Court of Appeals is required, by *Gibson* v. *Berryhill, supra.*

In *Gibson,* plaintiffs were licensed optometrists who were threatened with license revocation proceedings by the

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note that the 1974-79 Supplement to *Shepherd's United States Citations—Statute Edition* contains nearly five times as many citations to § 1983 as are contained in the 1968 Edition of that same volume even though the 1968 Edition covers 1,252 volumes of case reporters while the Supplement covers only 241 volumes.

11. The First, Second and Seventh Circuits recognize an exhaustion requirement in § 1983 cases under certain circumstances, *Fernandez v. Trias Monge,* 586 F. 2d 848 (1st Cir. 1978); *Plano* v. *Baker,* 504 F. 2d 595 (2d Cir. 1974) *but see, Graves* v. *Olgiati*; 550 F. 2d 1327 (2d Cir. 1977); *Secret* v. *Brierton,* 584 F. 2d 823 (7th Cir. 1978). The other circuits hold that exhaustion is never required before proceeding under § 1983. *Fitzgerald* v. *Mountain Laurel Racing, Inc.,* 607 F. 2d 589 (3d Cir. 1979); *Strader* v. *Troy,* 571 F. 2d 1263 (4th Cir. 1978); *Johnson* v. *American Credit Co. of Georgia,* 581 F. 2d 526 (5th Cir. 1978); *Hayes* v. *Board of Regents of Kentucky State University,* 495 F. 2d 1326 (6th Cir. 1974); *Green* v. *Ten Eyck,* 572 F. 2d 1233 (8th Cir. 1978); *Shouse* v. *Pierce County,* 559 F. 2d 1142 (9th Cir. 1977); *Spence* v. *Latting,* 512 F. 2d 93 (10th Cir.), *cert. denied,* 423 U. S. 896 (1975); *Chambers* v. *Local Union No. 639,* 578 F. 2d 375 (D.C. Cir. 1978).

Alabama Board of Optometry. They brought suit in a federal district court under § 1983 alleging that the administrative board which would hear their case was biased and would not provide a full and impartial hearing. The district court refused to require plaintiffs to exhaust their administrative remedies by forcing their participation in the Optometry Board hearing, a refusal affirmed by this Court which stated:

> In the instant case the matter of exhaustion of administrative remedies need not detain us long. Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated, at least where coverage or liability is contested and administrative expertise, discretion, or factfinding is involved. But this Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U. S. C. § 1983 [42 U. S. C. S. § 1983] Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. Thus, the question of the adequacy of the administrative remedy, an issue which under federal law the District Court was required to decide, was for all practical purposes identical with the merits of appellees' lawsuit.
>
> 411 U. S. at 574-5.
>
> (citations and footnotes omitted)

Thompson was threatened with license revocation proceedings before the Indiana Medical Licensing Board. He has filed suit under § 1983 alleging that these proceedings are unconstitutional because, *inter alia,* the Board is unconstitutionally constituted and biased.[12] Berryhill was an optometrist in Alabama; Thompson is a medical doctor in Indiana. Other than that trivial difference, the only distinction between Berryhill and Thompson is Berryhill chose to proceed in federal court while Thompson filed suit in state court. Yet the result reached thus far in these two suits is completely contradictory because Thompson, but not Berryhill, has been required to first exhaust state administrative remedies. Unless this Court reverses the decision of the Indiana Court of Appeals, litigants enforcing *federal* rights in state courts will be subjected to differing results solely because they chose the state rather than the federal forum. The implications of this difference are readily apparent and will result in further work for the federal courts by allowing state courts, using state law rules, to skirt their obligations to hear § 1983 claims over which they have concurrent jurisdiction.

The Indiana Court of Appeals frankly conceded the forum-oriented aspects of its decision, and the effect of that decision on future § 1983 litigants, when it said:[13]

> If Thompson desired the benefit of federal procedures, he should have brought his suit in federal court.

The enforcement of the federal right secured by the United States Constitution, and enforced through § 1983, cannot be made to turn on whether the action is brought in state or federal court. Both state and federal courtrooms must

12. Verified Complaint, ¶ 21, A37.

13. Although offering Thompson a different result in federal court, the Indiana Court of Appeals then suggested that a federal court may not hear Thompson's case due to abstention or comity. 398 N. E. 2d at 680, n. 1, A4. The "Catch-22" aspects of this reasoning are readily apparent.

remain open to § 1983 claimants on equal grounds. The Supremacy Clause and the decisions of this Court require no less.

In *Robinson, supra,* and *Tomanio, supra,* this Court, construing 42 U. S. C. § 1988, rejected attempts to develop a "federal common law" to be applied solely to claims arising under § 1983. By rejecting these attempts, this Court eliminated the possibility that a plaintiff's success would depend on whether he could state a claim under § 1983 or would be left with his state law remedies. The plea for uniformity among the federal courts in § 1983 actions, made and rejected in both *Robinson* and *Tomanio,* was not allowed to create the possibility of inconsistent decisions between state and federal courts in the same jurisdiction.

The opinion below injects such inconsistencies into § 1983 litigation by sanctioning differing applications of the exhaustion requirement depending on whether the case is tried before a state or a federal judge. Reversal of the decision below is necessary to prevent the very result feared in *Robinson* and *Tomanio.*

This Court's decision in *Withrow* v. *Larkin,* 421 U.S. 35 (1975) does not affect the decision here. *Withrow* upheld the constitutionality of a medical licensing board procedure which combined the investigative and adjudicative functions. This combination forms but one of the bases on which Thompson challenges the impartiality of the Indiana Medical Licensing Board. *Withrow* does not preclude a court's examination of Thompson's bias charge for in *Withrow* this Court said, 421 U. S. at 58:

> That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high. Findings

> of that kind made by judges with special insights into local realities are entitled to respect, but injunctions resting on such factors should be accompanied by at least the minimum findings required by Rules 52(a) and 65(d).

Here the Indiana courts have not considered the "special facts and circumstances" alleged in Thompson's complaint to ascertain the risk of unfairness. Instead, the Indiana courts have refused to examine the fairness of the Medical Licensing Board's procedures because Thompson has refused to submit to those procedures. Thompson is entitled to have his claim of unfairness determined on its merits.

CONCLUSION

The decision below erroneously applied Indiana law to a cause of action arising under 42 U. S. C. § 1983. This error resulted in the court below ignoring the clear dictates of this Court's decision in *Gibson* v. *Berryhill,* 411 U. S. 546 (1973). The writ should issue to reaffirm that federal law, as decided by this Court, governs the conduct of actions brought pursuant to 42 U. S. C. § 1983 and to correct the conflict between the decision below and *Gibson.*

Respectfully submitted,

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APPENDIX

OPINIONS BELOW

IN THE SUPREME COURT OF INDIANA

No. 2-1076-A-395

W. Turton Thompson v. Medical Licensing Board of Ind. et al.

You are hereby notified that the Supreme Court has on this day: Appellants Petition to Transfer is hereby Denied.

Givan, C.J. All Justices Concur in Denial excepting only Prentice, J. who is not participating.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 3rd day of April, 1980.

Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

IN THE COURT OF APPEALS OF INDIANA

Second District

No. 2-1076-A-395

W. TURTON THOMPSON,

Appellant (Plaintiff Below),

vs.

MEDICAL LICENSING BOARD OF INDIANA AND ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, AND EDWARD L. HOLLENBERG, INDIVIDUALLY AND AS MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA,

Appellees (Defendants Below)

APPEAL FROM THE MARION SUPERIOR COURT, ROOM SEVEN

The Honorable GERALD ZORE, *Judge*

BUCHANAN, C.J.

ON PETITION FOR REHEARING

Dr. W. Turton Thompson's petition for rehearing challenges our opinion of April 25, 1979, for failing to address an issue raised on appeal; specifically whether a plaintiff who files an action in state court under 42 USC § 1983 must exhaust his administrative remedies. Although this issue was implicitly decided in our earlier opinion, we now explicitly state our holding, and deny rehearing.

Thompson seeks shelter from the requirement of exhaustion of administrative remedies in § 1983. Not so.

We do not dispute Thompson's statement that state and federal courts have concurrent jurisdiction over § 1983 actions. *Young* v. *Board of Education of Fremont County School District* (D. Col. 1976) 416 F. Supp 1139; *Luker* v. *Nelson* (N. D. Ill. 1972) 341 F. Supp. 111. But the mere

existence of concurrent jurisdiction does not convert an Indiana state court into a federal court.

Thompson points to the general rule that exhaustion of state administrative remedies is not a prerequisite to bringing a § 1983 action in a federal court. *Damico* v. *California* (1967), 389 U. S. 416, 88 S. Ct. 526; *McNeese* v. *Board of Education* (1963), 373 U. S. 668, 83 S. Ct. 1433; *Snyder* v. *Altman* (1978), 444 F. Supp. 1269; *Kahn* v. *Shainswit* (1976), 414 F. Supp. 1064. Thompson then concludes, "Applying the federal decisions in § 1983 actions, it is clear that exhaustion of administrative remedies is not required in the case at bar."

The fatal flaw in this argument is that these federal decisions *are not applicable.*

The procedural rule set out by the courts above addresses only actions brought in federal court. No case cited by Thompson, nor any which we have been able to locate, demands that a state court abandon its own requirements of exhaustion merely because the claim before it is based upon § 1983.

Language in the federal decisions so indicates. In *Snyder* v. *Altman, supra,* the court stated:

> The general rule is that there is no need to exhaust possible state remedies before pursuing a civil rights action *in federal court.* (emphasis supplied)

444 F. Supp. at 1270.

Likewise, the court in *Kahn* v. *Shainswit, supra,* remarked:

> [Our decision] does not violate the general rule that *a federal litigant* need not exhaust state remedy in a § 1983 action. (emphasis supplied)

414 F. Supp. at 1068.

Thus we repeat, a state court does not undergo a metamorphosis into a federal court merely because it must

decide a § 1983 suit. No matter what the nature of the action before an Indiana state court, it remains a state court. As Gertrude Stein observed, a "rose is a rose is a rose is a rose." Our rules of trial procedure and evidence still apply. So does our requirement of exhaustion.

If Thompson desired the benefit of federal procedures, he should have brought his suit in federal court.[1]

Rehearing denied.
SHIELDS, J. CONCURS.
SULLIVAN, J. CONCURS.

1. Even if Thompson had brought suit in federal court, he may still have been refused a hearing on his claim based either on the doctrine of abstention, *see Snyder* v. *Altman, supra,* or comity, *see Kahn* v. *Shainswit, supra.*

IN THE COURT OF APPEALS OF INDIANA
Second District
No. 2-1076-A-395

W. TURTON THOMPSON,

Appellant (Plaintiff Below),

vs.

MEDICAL LICENSING BOARD OF INDIANA AND ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, AND EDWARD L. HOLLENBERG, INDIVIDUALLY AND AS MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA,

Appellees (Defendants Below).

APPEAL FROM THE MARION SUPERIOR COURT, ROOM SEVEN
The Honorable GERALD ZORE, Judge

BUCHANAN, C.J.

CASE SUMMARY

Dr. W. Turton Thompson (Dr. Thompson) appeals from dismissal of his complaint for an injunction and a declaratory judgment against the Medical Licensing Board of Indiana (Board) which sought to have his medical license revoked, claiming the trial court erred in dismissing his complaint because of failure to exhaust administrative remedies, constitutional infirmities in the medical licensing statutes, and denial of due process for refusal of discovery.

We affirm.

Facts

On October 23, 1975, Dr. Robert R. Kopecky, Secretary of the Board, filed a complaint against Dr. Thompson seeking to revoke or suspend his medical license or that he be placed on probation for violating sections 5 and

6 of IND. CODE 25-22.5-6-2. It specifically charged that Dr. Thompson:

> (1) illegally and knowingly issued prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office;
>
> (2) committed willful and wanton misconduct in the practice of medicine by illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office.

The Board set a hearing for November of 1975, to resolve these changes, but the hearing was twice continued by Dr. Thompson. Shortly before the new hearing date of February 12, 1976, Thompson retained new counsel and again sought a continuance which was denied. On February 11, 1976, he filed a complaint in Marion Superior Court seeking an injunction to delay the hearing and a declaratory judgment that the scheduled hearing would violate several constitutional guarantees. The violations he specifically alleged included the following:

a.) Thompson would be judged by Kopecky who is the complaining party;

b.) The complaint unlawfully incorporated by reference the provisions of other statutory provisions;

c.) It was unconstitutional to be tried before administrators who were not attorneys;

d.) He was prevented from deposing Board members in an attempt to find bias;

e.) Deputy attorney generals served the dual functions of prosecutor at the hearing and advisor to the Board on legal questions;

f.) The statute was unconstitutionally vague.

In order to support his suit seeking extraordinary relief Thompson asserted that allowing the Board to proceed with the hearing "could result in an improvident adjudication of guilt, the effects of which could not be vindicated after the proceeding took place." Concluding that he did not have adequate post-administrative hearing remedies regard these constitutional issues he raised, he asserted that the trial court should intervene to protect him from suffering an irreparable harm.[1]

The State filed a Motion to Dismiss the suit claiming that Dr. Thompson should be required to exhaust the adequate administrative remedies available to him and that he should not be allowed to interfere with the administrative process.

During the course of the court proceedings Dr. Thompson claimed "bias and prejudice" on the part of the members and sought to depose them individually, a move which was thwarted by a protective order entered by the trial court on May 28.

On June 4, 1976, the trial court entered the following judgment on the State's motion:

> . . . it is . . . ORDERED that defendant's [Board's] motion to dismiss be, and is hereby, GRANTED upon the ground that the plaintiff has failed to exhaust his administrative remedies before the Medical Licensing Board of Indiana. Accordingly, it is the judgment of this Court that plaintiffs' verified complaint be, and is hereby, DISMISSED, each party to bear its own costs in the action . . . .

Dr. Thompson sought and received an Injunction and Stay Pending Appeal, and appealed the trial court's decision to this Court.

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1. Dr. Thompson does not specify precisely what irreparable harm he would suffer other than, presumably, a harm to his reputation caused by an "improvident adjudication of guilt."

Issues

Because our holding is that the trial court properly dismissed Dr. Thompson's complaint for failing to exhaust his administrative remedy, we need only decide the following issue:

> Did the trial court properly dismiss Dr. Thompson's action for an injunction and a declaratory judgment on the ground that he failed to exhaust his administrative remedies before filing suit?

PARTIES' CONTENTIONS — Dr. Thompson contends that although the principle of exhaustion of administrative remedies is a general rule, he should be allowed to bypass the normal review procedure because he has raised pure "questions of law" concerning constitutional issues. Unless he is permitted preliminary review of these questions, his professional reputation might suffer irreparable harm.

The State replies that Dr. Thompson has an adequate procedure for consideration of these issues under the Administrative Adjudication Act (IND. CODE 4-22-1-1 et seq). As he has failed to demonstrate how he might be irreparably harmed by resorting to review under the AAA, the trial court correctly denied his extraordinary relief.

Decision

CONCLUSION—The trial court properly dismissed this action because Dr. Thompson failed to follow the administrative review procedure of the Administrative Adjudication Act.

A. EXCLUSIVITY OF THE STATUTORY ADMINISTRATIVE REMEDY

By enacting the Administrative Adjudication Act (the Act) in 1947, the Indiana legislature recognized the basic need for unfettered action by administrative agencies oper-

ating within the sphere of their authority. *Uhlir v. Ritz* (1970), 255 Ind. 342, 264 N. E. 2d 312; *Indiana Alcoholic Beverage Com'n* v. *McShane* (1976), — Ind. App. —, 354 N. E. 2d 259.

The unmistakable aim of a uniform system of orderly review of administrative adjudications in Indiana is declared in the first section of the Act:

> It is the intent *to establish a uniform method* of administrative adjudication by all agencies of the state of Indiana, to provide for due notice and an opportunity to be heard and present evidence before such agency *and to establish a uniform method of court review of all such administrative adjudication.* (emphasis supplied)
>
> IND. CODE 4-22-1-1.

That such court review of administrative action affecting legal relationships is intended to be exclusive, if more is needed, is emphasized by the explicit language of Section 3 of the Act:

> In *every administrative adjudication* in whch the rights, duties, obligations, privileges or other legal relations of any person are required or authorized by statute to be determined by any agency *the same shall be made in accordance with this act and not otherwise.* (emphasis supplied)
>
> IND. CODE 4-22-1-3.

Also indicative of this same intent is Section 30 invalidating any conflicting legislation:

> The provisions of this act shall supersede or control the provisions of any general or special act in conflict herewith, passed by this general assembly, regardless of whether such act or acts were passed before or after the effective date (March 14, 1977) of this act.

Particularly the grounds for review of administrative action is Section 14, which, after setting forth five grounds for review, significantly then terminates all rights of re-

course to the courts unless the review procedure is followed. In pertinent part Section 14 says:

> Any party or person aggrieved by any order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act [4-22-1-1—4-22-1-30]. Such review may be had by filing with the circuit or superior court of the county in which such person resides, or in any county in which such order or determination is to be carried out or enforced, a verified petition setting out such order, decision or determination so made by said agency, and alleging specifically wherein said order, decision or determination is:
>
> (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
>
> (2) Contrary to constitutional right, power, privilege or immunity; or
>
> (3) In excess of statutory jurisdiction, authority or limitations, or short of statutory rights; or
>
> (4) Without observance of procedure required by law; or
>
> (5) Unsupported by substantial evidence.
>
> Said petition for review shall be filed within fifteen [15] days after receipt of notice that such order, decision or determination is made by any such agency. Notice shall be given in the manner prescribed by section 6 [4-22-1-6] of this act. *Unless a proceeding for review is commenced by so filing such petition within fifteen [15] days any and all rights of judicial review and all rights of recourse to the courts shall terminate.* (emphasis supplied)

So the Act restricts access to the courts even though the administrative agency takes action affecting "rights, duties, obligations, privileges or other legal relations" (Section 3). An this broad statement includes constitutional rights, duties, and privileges inasmuch as the second stated ground for review of an order, decision, or determination is that

the action taken is "contrary to constitutional right, power, privilege . . .".

The thrust of the Act is that the exclusive path to the courts is *by review.* The administrative process is not to be disrupted and delayed.[2]

The exclusivity of the review procedure contemplated by the Act is founded on the common-law principle of exhaustion of administrative review procedures before resorting to judicial action. *State ex rel. Paynter* v. *Marion County Superior Court, Room No. 5* (1976), — Ind. —, 344 N.E.2d 846; *City of East Chicago* v. *Sinclair Refining Co.* (1953), 232 Ind. 295, 111 N. E. 2d 459; *State ex rel. Evansville City Coach Lines, Inc.* v. *Rawlings* (1951), 229 Ind. 552, 99 N. E. 2d 597.

A forceful statement of this concept is found in *Public Service Commission of Indiana et al.* v. *City of Indianapolis* (1956), 235 Ind. 70, 83, 131 N.E.2d 308, 313:

> However, where the statute provides for a procedure for such review or for a judicial remedy, *it excludes any common law or equitable procedure* to the extent such statutory provisions are adequate in protecting and preserving such substantive rights guaranteed by the constitution, the states or general principles of law. Such statutory procedure must be followed at least to the extent of the remedy available before resort is made to any common law or equitable remedy. (emphasis supplied)

Also see Ballman v. *Duffecy* (1952), 230 Ind. 220, 102 N. E. 2d 646; *Joseph E. Seagram & Sons* v. *Board of Com'rs* (1943), 220 Ind. 604, 45 N. E. 2d 491; *State ex rel. White v. Hilgemann, Judge* (1941), 218 Ind. 572, 34 N. E. 2d 129; *Warren* v. *Indiana Telephone Co.* (1940), 217 Ind. 93, 26 N. E. 2d 399.

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2. Errors made by the administrative agency may be discovered and cured in the course of its action. *McShane, supra.*

It is often stated that if the administrative remedy has not been exhausted, a court does not have jurisdiction to take action. *State ex rel. Indianapolis Water Co.* v. *Boone Circuit Court* (1974), 261 Ind. 583, 307 N. E. 2d 870; *Indianapolis Power & Light Co.* v. *Highland Realty Co.* (1970), 253 Ind. 637, 256 N. E. 2d 394; *State ex rel. Public Service Com'n* v. *Marion Circuit Court* (1961), 242 Ind. 145, 177 N. E. 2d 397; *Amburgey* v. *Miller* (1977), — Ind. App. —, 362 N. E. 2d 869; *Decatur County R. E. M. C.* v. *Public Service Co. of Indiana* (1971), 150 Ind. App. 193, 175 N. E. 2d 857. *See also Indiana Bell Telephone Co.* v. *Friedland* (1978), — Ind. App. —, 373 N. E. 2d 344.

The so-called "exclusive remedy" doctrine was recently challenged in *Paynter, supra,* a case in which the Supreme Court considered and rejected an attempt, similar to the one before us, to by-pass the administrative review machinery of the Act.

The operator of a health care facility was notified to appear before the Indiana Health Facilities Council to determine if she was operating without a license. Prior to the scheduled hearing she sought and obtained a Writ of Prohibition in a trial court restraining action by the agency, claiming violation of her constitutional rights under the Fifth[3] and Fourteenth Amendments[4] of the United States Constitution.

In ruling that the trial court wrongfully interfered with the administrative process the court emphatically embraced the necessity of exhaustion of administrative remedy:[5]

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3. Relator claimed that violation of Moore's Fifth Amendment right to remain silent constituted an irreparable harm sufficient to invoke equitable relief.

4. Like Dr. Thompson, relator claimed that it was prejudicial for the Attorney General to serve in a prosecutorial and advisory role, a claim the court specifically rejected. *Paynter, supra,* at 850.

5. Justice Hunter in his concurring opinion in *Paynter* stated:

> . . . , even if the outcome (of the administrative hearing) is not

> A determination by an administrative board that has authority to act in a given case may be subjected to judicial review under the Administrative Adjudication Act, as may findings of fact. IND. CODE 4-22-1-14 (§ 14). *The respondents have not shown this remedy at law is inadequate.* No Fifth Amendment rights are jeopardized. No savings in the cost or time of litigation have been demonstrated.
>
> *The statute here affords an adequate administrative procedure and review. It is fundamental that no one is entitled to judicial relief until the prescribed administrative remedies have been exhausted.* (emphasis supplied)

344 N. E. 2d at 851.

Thus, the explicit terms of the Act and the last word of the Supreme Court in *Paynter,* leads us inevitably to the conclusion that unless Dr. Thompson can demonstrate he is entitled to equitable or extraordinary relief, he is limited by the Act to the prescribed procedure for judicial review under Section 14.

Our conclusion is not altered by the Supreme Court's decision, *Wilson* v. *Review Board of Indiana Employment Security Division,* — Ind. —, 385 N. E. 2d 438 (Cause No. 279S28, Handdown Date 2-8-79), a case arising under the Indiana Employment Security Act, IND. CODE 22-4-1-1 et seq. and not under the AAA.

The provision relating to appeals under the Indiana Employment Security Act is IND. CODE 22-4-17-12 which, unlike

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in her favor, she will have developed a factual record to support her claim that the Health Facilities Council, under the statutory arrangement assigning preliminary investigative functions to it, is not sufficiently impartial to satisfy the Due Process Clause.

For the reasons stated above, I *concur* with the majority *that the claim presented here is properly reviewable through the machinery of the Administrative Adjudication Act and not by way of this original action.* (emphasis supplied)

344 N.E.2d at 852.

the AAA fails to contain even a hint that the procedure provided is exclusive:

> Any decision of the review board shall be conclusive and binding as to all questions of fact. Either party to the dispute, the board or the director *may*, within thirty [30] days after notice of intention to appeal as herein provided, *appeal the decision to the Appellate Court (Court of Appeals)* for errors of law under the same terms and conditions as govern appeals in ordinary civil actions. (Emphasis supplied

Also, in *Wilson* the controversy involved a legal question only, all factual issues having been resolved through the *completion* of the administrative hearing process so that the courts could resolve the entire controversy between the litigants.

The Supreme Court in *Wilson* made no reference to *Paynter*, which prompts an inference that they, like us, believe Wilson to be distinguishable from cases arising under the AAA.

B. INJUNCTIVE RELIEF

(1) Adequate Remedy At Law.

In order to qualify for equitable relief Dr. Thompson must show great and irreparable injury or damage and that he has no adequate remedy at law. *City of Gary, Lake County* v. *Ayers* (1968), 251 Ind. 193, 238 N. E. 2d 17; *Southside Motor Coach Corporation* v. *McFarland, et al.* (1934), 207 Ind. 301, 191 N. E. 2d 147. *See also Owens* v. *Downs* (1951), 121 Ind. App. 294, 98 N. E. 2d 914.

That Section 14 (the review procedure) does provide an adequate legal remedy to consider the constitutional issues raised by Dr. Thompson has already been decided by *Paynter* . . . "The Respondents have not shown that this remedy at law is inadequate." Dr. Thompson can assert

by way of judicial review that the Board's action is "contrary to constitutional right, power, privilege, or immunity;" (Section 14).

(2) Irreparable Harm

But has he been irreparably harmed. His claim is that his professional reputation would be irreparably harmed if he is forced to litigate the constitutional issues at the conclusion of the administrative process.

In *Downing* v. *Board of Zoning Appeals of Whitley County* (1971), 149 Ind. App. 687, 274 N. E. 2d 542, this Court expressed serious reservations as to whether one could ever suffer irreparable injury prior to a final action by an agency:

> Generally, judicial review is denied for lack of finality if an action by an administrative agency is only anticipated.

149 Ind. App. at 690, 274 N. E. 2d at 544.

To the same effect is *Indiana Alcoholic Beverage Com'n* v. *McShane* (1976), — Ind. App. —, 354 N. E. 2d 259.

Final or not, the overwhelming majority rule is that harm to professional reputation is not the kind of irreparable injury that forms the basis for equitable relief. Bad publicity generated by revocation of a license is not deemed to be the type of irreparable injury contemplated, and injunctions have been almost uniformly denied to professionals seeking to stop license revocation hearings because of damage to their reputation. *See Beckanstin* v. *Bradbury* (1958), 214 Ga. 27, 102 S. E. 2d 486 (architect's license); *Baugher* v. *Walker* (1977), 47 Ill. App. 3d 573, 362 N. E. 2d 410 (pharmacists); *Allen* v. *Louisiana Board of Alcoholic Beverage Control* (1962), (La.), 146 So. 2d 662 (liquor license); *Feinblum* v. *Louisiana State Board of Optometric Examiners* (1957), (La.), 97 So. 2d 657 (optometrist); *State* v. *Ingham County Circuit Judge* (1972), 41 Mich. App. 700,

200 N. W. 2d 774 (car dealer); *Bridges* v. *State Board of Registration for Healing Arts* (1967), (Mo.), 419 S. W. 2d 278 (physician); *Texas State Board of Examiners in Optometry* v. *Carp.* (1951), 162 Texas 1, 343 S. W. 2d 242 (optometrist).

Typical is *Pye* v. *Commonwealth* (1977), (Pa.), 372 A. 2d 33:

> Prospective parties to administrative agency actions may not bypass that process and challenge the prospective action directly in the courts. The alleged irreparable harm—that of adverse publicity—is a risk encountered by all parties to legal proceedings and is not alone sufficient to invoke the remedy of injunction.

Dr. Thompson has not demonstrated entitlement to extraordinary equitable relief. As the trial court properly found, he is limited to the judicial procedure of Section 14. His position is unlike the Plaintiff in *Indiana Education Employment Relations Board* v. *Benton Community School Corp.* (1977), — Ind. —, 365 N. E. 2d 752, who had no judicial review available because of the terms of the collective bargaining statute under which it was proceeding.

C. DECLARATORY JUDGMENT

Again seeking a forum other than the administrative process to hear constitutional issues Dr. Thompson has sought refuge under the ramparts of the Indiana Declaratory Judgment Act, IND. CODE 34-4-10-2, which provides in relevant part:

> Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute, . . . and obtain a declaration of rights, status or other legal relations thereunder.

The guide for application of the Act is IND. CODE 34-4-10-12:

> This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

However, liberal construction does not mean "carte blanche." A declaratory judgment is said to be proper if another legal remedy exists, only "where it is appropriate". Ind. Rules of Procedure, TR. 57.

As a general rule, an action for a declaratory judgment will be dismissed if there is pending another action or proceeding with some of the same parties which may adjudicate some of the identical issues involved in the declaratory action. *Fegaro* v. *South Central Bell* (1971), 287 Ala. 407, 252 So. 2d 66; *Mid-State Construction Co.* v. *Means* (1968), (Ark.) 434 S. W. 2d 292; *Transamerica Insurance Co.* v. *Whitney National Bank of New Orleans* (1968), (La.) 206 So. 2d 500; *Watson* v. *Dorsey* (1972), 265 Md. 509, 290 A. 2d 530; *Berigan Bros.* v. *Growers Cattle Credit Corp. of Omaha* (1976), 182 Neb. 656, 156 N.W. 2d 794; *Nelson* v. *Knight* (1968), 254 Ore. 370, 460 P. 2d 355; *Eisenhauer* v. *Williams* (Tex., 1976), 537 S. W. 2d 336.

The propriety of declaratory relief must always be judged with reference to whether the issue in question is more properly resolved in another forum, *Hanes Corp.* v. *Millard* (D.C. Cir., 1976), 531 F. 2d 585. Declaratory relief has been denied if the declaratory judgment would not fully resolve all the issues between the parties, e.g., *Sears Roebuck and Company* v. *Zurich Insurance Company* (1969, N. D. Ill.), 295 F. Supp. 518; or ". . . when the final judgment in the accrued action may in fact make the question raised in the declaratory judgment action moot." *Allstate Insurance Co.* v. *Mahan* (1969), 223 Tenn. 496, 448 S. W. 2d 392, 393.

The courts have been reluctant to grant declaratory relief if the result is to bypass administrative procedure. *Verbecke* v. *Verbecke* (1958), 352 Mich. 468, 90 N. W. 2d 487; *Adams* v. *Atlantic City* (1948), 26 N. J. Misc. 259, 59 A. 2d 825; *Cha-Toine Hotel Apartment Bldg. Corp.* v. *Shogren* (1953, 7th Cir.), 204 F. 2d 256. In *City of Cheyenne* v. *Sims* (1974), 521 P. 2d 1347, 1350, the Wyoming Supreme Court, in affirming a dismissal of a declaratory judgment action to determine certain property tax-exempt prior to assessment, held: "Declaratory relief should not be used to usurp or replace specific administrative relief, particularly when the initial decision is committed to an administrative body."

However, the actual determination of whether the presence of another form of relief should justify a refusal to grant declaratory relief is within the trial court's discretion. *All-State Ins. Co.* v. *Fisher* (1973), 107 Cal. Rptr. 251, 31 C. A. 3d 391; *Textron, Inc.* v. *Wood* (1974), 167 Conn. 334, 355 A. 2d 307; *Hampson* v. *State ex rel. Buckson* (1967) (Del.), 233 A. 2d 155; *Harris* v. *State Bank & Trust Co. of Wellston* (1972), (Mo.) 484 S. W. 2d 177; *Slosburg* v. *City of Omaha, supra; Equitable Leasing, Inc.* v. *Maguire* (1971), 321 N. Y. S. 2d 410, 36 A. D. 2d 1020; *C. H. Pitt Corp.* v. *Insurance Co. of N. America* (1969), 435 Pa. 381, 257 A. 2d 857. Absent an abuse of that discretion the trial court's decision will be upheld. *Allstate Ins. Co., supra; Girard* v. *Miller* (1963), 29 Cal. Rptr. 359.

While Indiana courts have never considered the exact circumstances under which it might be an abuse of discretion for a trial court to deny declaratory judgment relief when an administrative remedy has not been exhausted, several relevant factors in making such a decision emerge from the cases, here and elsewhere:

a.) Use of the remedy which most completely resolves all the issues between the parties; *Hanes Corp., supra;*

b.) Whether the administrative remedy is adequate; *See Ind. Ed. Employment Relations Bd. v. Benton Community Schools* (1977), — Ind. —, 365 N. E. 2d 752;

c.) Whether declaratory relief is necessary to prevent irreparable harm; *Beckanstin, supra;*

d.) Damage to the administrative process by allowing a declaratory judgment; *Downing, supra;*

e.) The extent of unnecessary delay resulting from allowing declaratory judgment.

We have already determined that Dr. Thompson would not be irreparably harmed by being confined to the prescribed administrative procedure and that such a remedy is adequate. Also, it is obvious that the declaratory judgment action can only resolve one aspect of the dispute between Dr. Thompson and the Board, his constitutional objections, leaving unresolved the misconduct charges against him.

This case exemplifies the potential for delay if resort is allowed to the courts for a declaratory judgment and an appeal taken to the appellate courts. It has been over three years since the complaint was filed against Dr. Thompson.

Allowing the Declaratory Judgment Act to be used as a vehicle to bypass the administrative process created by statute can seriously weaken the effectiveness of that process. Obviously years can be added to the administrative process before an administrative determination is made. Review of the process becomes piecemeal, an undesirable state of affairs resulting in unnecessary delay and duplication in a court system already burdened with demands exceeding its capacity to respond. The evils of piecemeal appeals are apparent. *See First Equity Security Life Ins. Co.* v. *Keith* (1975), — Ind. App. —, 329 N. E. 2d 45.

Thus by the criteria we have relied on, the conclusion is inevitable that under these circumstances the remedy of declaratory judgment was properly denied.

Indiana Education Employment Relations Board v. *Benton Community School Corp., supra,* is in no respect contrary to our conclusion. It allowed declaratory relief because there was no other remedy (i.e., no administrative review) available to the Benton Community School Corp. The discussion there of the exception made actually serves to revitalize the principle that the judicial review mechanism of the Act must be followed. *Also see Warren* v. *Indiana Telephone Co., supra.*

The trial court properly dismissed Dr. Thompson's action seeking declaratory and injunctive relief.

Affirmed.

Shields, J. concurs; Sullivan, J. concurs with separate opinion.

SULLIVAN, J., Concurring:

I express a degree of doubt that the provision of I. C. 4-22-1-14 which authorizes judicial review of an administrative "order, decision or determination" if "[c]ontrary to constitutional right, power, privilege or immunity", was intended to embrace a constitutional attack upon the statutory authority for the administrative agency to act at all, as opposed to an attack upon certain decisions which are infected by unconstitutional procedures or acts which occur during the exercise of otherwise valid authority or power. A challenge to the underlying authority of the agency itself is quite different in nature and scope from a challenge to the manner in which valid authority is exercised.

In the case before us the majority observes that "the declaratory judgment action can only resolve one aspect of the dispute between Dr. Thompson and the Board, his constitutional objections, leaving unresolved the misconduct charges against him." (Slip Opinion p. 15). If the sole issue involved unconstitutionality of I. C. 25-22.5-6-2 on its face, I would hold the declaratory judgment action to be an

appropriate remedy without resort to further proceedings within the administrative review process. See *State ex rel. City of South Bend* v. *St. Joseph Superior Court* (1958) 238 Ind. 88, 148 N. E. 2d 558; *State ex rel. City of South Bend* v. *Marckle* (1939) 215 Ind. 74, 18 N. E. 2d 764.

MOTION TO CORRECT ERRORS

IN THE MARION COUNTY SUPERIOR COURT ROOM NO. 7
CAUSE NO. S776-155

(Filed Marion Superior Court Room No. 7—July 26, 1976)
W. TURTON THOMPSON,

Plaintiff,

vs.

MEDICAL LICENSING BOARD OF INDIANA AND ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, AND EDWARD L. HOLLENBERG, INDIVIDUALLY AND AS MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA,

Defendants.

MOTION TO CORRECT ERRORS

Plaintiff, W. Turton Thompson, pursuant to Trial Rule 59(A)(5), (8) and (9), by counsel, C. Robert Knight and Ronald E. Elberger, moves this court to correct the errors herein designated by correcting the judgment of the court to a finding for the plaintiff in all respects on the February 11, 1976, verified complaint filed in the above-captioned cause of action for each of the following reasons:

1. This court's order and judgment of June 14, 1976, dismissing plaintiff's verified complaint for failure to exhaust administrative remedies is contrary to law in that:

a. Plaintiff's exhaustion of administrative remedies before the Medical Licensing Board of Indiana is not a prerequisite to this court's exercise of jurisdiction over this action; and in that

b. The Medical Licensing Board of Indiana is not a competent tribunal to adjudicate the constitutional issues raised in plaintiff's February 11, 1976 verified complaint, involving the constitutionality of the statutes and procedures employed by the Medical Licensing Board of Indiana including (1) plaintiff's challenge to I. C. 25-22.5-6-2(5) as being unconstitutional in that said section is vague

and overbroad and fails to give adequate notice of proscribed conduct and fails to specify or otherwise identify drugs classified as "narcotic", "addicting" or "dangerous" absent the Medical Licensing Board engaging in an unlawful incorporation by reference of another separate and distinct statutory scheme which plaintiff maintains would constitute an unlawful delegation of legislative authority; and (2) plaintiff's challenge that I. C. 25-22.5-6-2(6) is unconstitutionally vague and overbroad in that the terms "willful or wanton misconduct" are insufficient to apprise one of conduct which is prohibited; and (3) plaintiff's allegation that the compulsion of defending one's self before non-attorney "judges" of the Board constitutes a denial of due process in contravention and violation of the Fourteenth Amendment to the United States Constitution and of Article 1, § 12 of the Constitution of the State of Indiana;

2. This court's order and judgment of June 14, 1976, which dismissed plaintiff's verified complaint and thereby denied plaintiff preliminary and permanent injunctive relief is contrary to law and erroneous in that the plaintiff is compelled to subject himself to an administrative disciplinary hearing, which could result in the revocation or suspension of his license to practice medicine, before non-attorney members of the Medical Licensing Board of Indiana who are untrained and unfamiliar with principles of law and arguments of counsel in violation and contravention of plaintiff's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, § 12 of the Constitution of Indiana.

3. This court's order and judgment of June 14, 1976, which dismissed plaintiff's verified complaint and thereby denied plaintiff preliminary and permanent injunctive relief is contrary to law and erroneous in that the statutory provisions with whose violation plaintiff is charged in

administrative disciplinary proceedings before the Medical Licensing Board of Indiana are unlawful and unconstitutional in the following particulars:

a. I. C. 25-22.5-6-2(5) is vague and overbroad in that it fails to describe or identify those drugs classified as "narcotic", "addicting" or "dangerous" and brings within its ambit drugs of numerous descriptions, compositions and identities which are not, or may not be, "narcotic" or "addicting" or "dangerous"; and

b. The Medical Licensing Board of Indiana has failed and neglected to identify, designate or specify those drugs which are either "narcotic" or "addicting" or "dangerous", absent an unlawful incorporation by reference of other separate and distinct statutory provisions, thereby failing to give notice of such drug classifications in violation and contravention of plaintiff's right to due process and notice of the charges against him; and

c. The Medical Licensing Board of Indiana has wrongfully and unlawfully incorporated by reference other statutory provisions unrelated to and distinct from I. C. 25-22.5-6-2(5) to define "narcotic", "addicting" and "dangerous" drugs; and

d. I. C. 25-22.5-6-2(6) is vague and overbroad in that the terms "willful or wanton misconduct" are insufficient to apprise a respondent in administrative disciplinary proceedings of that conduct which is prohibited in direct and unmistakable terms with clearness and certainty, and brings within their ambit conduct which is permissible or otherwise constitutionally protected, thereby failing to give notice of the particular conduct which is prohibited in violation and contravention of such respondent's right to due process and notice of the charges against him.

4. This court's order and judgment of June 14, 1976, which dismissed plaintiff's verified complaint and thereby denied plaintiff preliminary and permanent injunctive relief, and this court's order of May 28, 1976 which granted

defendants' motion for protective order and thereby precluded the taking of depositions upon oral examination of the members and staff of the Medical Licensing Board of Indiana are contrary to law and erroneous in that the plaintiff—a respondent in administrative disciplinary proceedings before the Medical Licensing Board of Indiana—is precluded from engaging in discovery to ascertain evidence of the bias and prejudice of the administrative Board members who are to judge him, one of those members, Robert R. Kopecky, is the complaining and charging party, thereby constituting a denial of plaintiff's right to due process as guaranteed by Article 1, § 12 of the Constitutional of Indiana and by the due process clause of the Fourteenth Amendment to the United States Constitution.

5. This court's order and judgment of June 14, 1976, which dismissed plaintiff's verified complaint and thereby denied plaintiff preliminary and permanent injunctive relief, and this court's order of May 28, 1976 which granted defendants' motion for protective order and thereby precluded the taking of depositions upon oral examination of the members and staff of the Medical Licensing Board of Indiana are contrary to law and erroneous in that the plaintiff—a respondent in administrative disciplinary proceedings before the Medical Licensing Board of Indiana—is to be judged by a person, Robert R. Kopecky, who is the complaining and charging party, and/or other persons unduly influenced by said Board member, in violation and contravention to plaintiff's right to due process of law and a fair trial having the appearance of fairness as secured by the due process clause of the Fourteenth Amendment to the United States Constitution and by Article 1, § 12 of the Constitution of Indiana.

6. This court's order and judgment of June 14, 1976, which dismissed plaintiff's verified complaint and thereby denied plaintiff preliminary and permanent injunctive relief, and this court's order of May 28, 1976, which granted

defendants' motion for protective order and thereby precluded the taking of depositions upon oral examination of the members and staff of the Medical Licensing Board of Indiana are contrary to law and erroneous in that the plaintiff is being prosecuted before the Medical Licensing Board by deputy attorneys general who are also the advisors to the Medical Licensing Board, such dual role resulting in the violation of plaintiff's right to a fair trial in a fair tribunal having the appearance of fairness.

WHEREFORE, plaintiff, W. Turton Thompson, by counsel, prays that this court correct the errors hereinbefore set forth.

Respectfully submitted,
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Motion to Correct Errors" has been served upon:

Peter Drum, Esquire
Deputy Attorney General
219 State House
Indianapolis, IN 46204

by mailing a copy hereof by first class United States mail, postage prepaid to him this 29th day of July, 1976

Ronald E. Elberger

IN THE MARION COUNTY SUPERIOR COURT ROOM NO. 7

CAUSE NO. S775-155

(Filed Marion Superior Court Room No. 7—June 14, 1976)

W. TURTON THOMPSON,

Plaintiff,

vs.

MEDICAL LICENSING BOARD OF INDIANA AND ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, AND EDWARD L. HOLLENBERG, INDIVIDUALLY AND AS MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA,

Defendants.

ORDER AND JUDGMENT

Upon consideration of plaintiff's motion for reconsideration of May 28, 1976 Order, and the Court having reviewed and considered the pleadings, memoranda of law, and prior oral arguments of counsel regarding defendants' motion to dismiss, and being duly advised in the premises, it is

ORDERED that plaintiff's motion for reconsideration of May 28, 1976, be, and is hereby GRANTED, and, upon reconsideration of this Court's order and ruling of May 28, 1976, it is further

ORDERED that defendants' motion to dismiss be, and is hereby, GRANTED upon the ground that the plaintiff has failed to exhaust his administrative remedies before the Medical Licensing Board of Indiana. Accordingly, it is the judgment of this Court that plaintiff's verified complaint be, and is hereby, DISMISSED, each party to bear its own costs in the action; and it is further

ORDERED that the bond previously posted in this Court upon which W. Turton Thompson is the principal and Hart-

ford Accident and Indemnity Co. is the surety be, and is hereby, discharged and released.

Dated this 14th day of June, 1976.

GERALD S. ZORE, JUDGE
SUPERIOR COURT OF MARION COUNTY, ROOM 7

VERIFIED COMPLAINT

IN THE MARION COUNTY SUPERIOR COURT ROOM NO. 7
(Filed Marion Superior Court Room No. 7—
February 11, 1976)

W. TURTON THOMPSON,

Plaintiff,

vs.

MEDICAL LICENSING BOARD OF INDIANA AND ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, AND EDWARD L. HOLLENBERG, INDIVIDUALLY AND AS MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA,

Defendants.

VERIFIED COMPLAINT

Plaintiff, W. Turton Thompson, by counsel, for his causes of action against the defendants, Medical Licensing Board of Indiana and Ernest R. Beaver, James N. Hampton, Robert R. Kopecky, James H. Mader, Walter J. Beneville, Bruce C. Brink and Edward L. Hollenberg, individually and as members of the Medical Licensing Board of Indiana, for injunctive relief pursuant to I. C. 34-1-10-1 *et seq.* and 42 U. S. C. § 1983, and for a declaratory judgment pursuant to I. C. 34-4-10-1 *et seq.* States that:

COUNT I

1. Plaintiff, W. Turton Thompson (hereinafter referred to as "Thompson"), is a physician, duly licensed by the Medical Licensing Board of Indiana to practice medicine, surgery and obstetrics in the State of Indiana, with his offices and residence located in Jeffersonville, Indiana.

2. Defendant, Medical Licensing Board of Indiana (hereinafter referred to as "Board"), is an agency of the State

of Indiana whose powers and duties are set forth in I. C. 25-22.5-2-7. The Board is also authorized to conduct proceedings and hearings regarding the probation of a licensee and for the suspension of revocation of a license to practice medicine issued by said Board. The Board's offices are located in the State Board of Health Annex, 1375 West 16th Street, Indianapolis, Indiana.

3. Defendants, Ernest R. Beaver, James N. Hampton, Robert R. Kopecky, John H. Mader, Walter J. Beneville, Bruce C. Brink and Edward L. Hollenberg, are the duly appointed members of the Medical Licensing Board of Indiana upon whom are conferred those powers and duties enumerated in I. C. 25-22.5-2-7, who conduct proceedings and hearings regarding the probation of a licensee, or the suspension or revocation of a license to practice medicine issued by said Board pursuant to I. C. 25-22-5-6-3(a). At all times relevant hereto said defendants have acted under color of state law in their official public positions as Board members.

FACTS

4. On or about May 6, 1957, Thompson filed with the Board his application for a license to practice medicine, which license was duly issued to him by the Board on September 11, 1958, and is still in force and effect.

5. The Board is authorized to conduct disciplinary proceedings pursuant to I. C. 25-22.5-6-3(a) which provides that:

> (a) Proceedings for the probation of a licensee or a permit holder or the revocation or suspension of any license or permit to practice medicine or osteopathic medicine in Indiana must be commenced by the filing of written verified charges with the secretary of the board. These charges may be filed by any resident of Indiana, or by the secretary or any member of the board upon information from whatever source in his possession, which causes the member to have

reasonable cause to believe that the matter should be filed and placed before the board for its determination. Proceedings for probation of a licensee or permit holder or revocation or suspension of any license or permit to practice medicine or osteopathic medicine in Indiana must be conducted according to the Administrative Adjudication Act of Indiana, I. C. 1971, 4-22--1 [4-22-1-1—4-22-1-30].

6. The grounds for probation of a licensee or for suspension or revocation of a license are specified in I. C. 25-22.5-6-2 which provides that:

To promote uniformity among the several states and territories and to provide guidelines for physicians and the board, the following charges will be grounds for probation of a licensee or suspension or revocation of a license:

(1) the use of any false, fraudulent or forged statement or document, or the use of any fraudulent, deceitful, dishonest or immoral practice in connection with any of the licensing or permit requirements;

(2) the acts from which a felony conviction resulted, if the acts have a direct bearing on whether or not the person should be entrusted to serve the public as a licensed physician;

(3) currently using or consuming a drug or intoxicant so as to render the licensee unsafe or unfit to practice medicine or osteopathic medicine;

(4) suffering from a mental or physical disability so as to render the licensee unsafe or unfit to practice medicine or osteopathic medicine;

(5) except as otherwise permitted by law, to knowingly prescribe, sell or administer any drug classified as a narcotic, addicting or dangerous drug to a habitue or addict;

(6) wilful or wanton misconduct or manifest incapacity in the practice of medicine or osteopathic medicine;

(7) the practice of medicine or osteopathic medicine under a false or assumed name; or

(8) the wilful performance of an act likely to deceive or harm the public. [I. C. 1971, 25-22.5-6-2, as added by Acts 1975, P. L. 271, § 1, p. —.]

7. On or about October 23, 1975, disciplinary proceedings were instituted by the Board against Thompson on the basis of a complaint, a copy of which is attached hereto as Exhibit "A" and is incorporated herein by reference, which charged Thompson with violations of I. C. 25-22.5-6-2(5) and (6), in that he is alleged to have:

1. Illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2 (5), Chapter 6 of Acts 1975, Public Law 271.
2. Willful and wanton misconduct in the practice of medicine by illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2 (6), Chapter 6 of Acts 1975, Public Law 271.

8. At no time has the Board promulgated or adopted any rules or regulations which define, identify or specify those drugs classified as "narcotic", "addicting" or "dangerous", thereby bringing within the definition of said terms, as contained in I. C. 25-22.5-6-2(5), drugs of every type, description, composition and form, nor has the Board promulgated or adopted any rules or regulations which define specify or identify the meaning of "habitue" or "addict" as those terms are used in I. C. 25-22.5-6-2(5).

9. At *no* time has the Board charged Thompson with prescribing any drug classified as a narcotic, addicting or dangerous drug *to a "habitue* or *addict."*

10. At no time has the Board promulgated or adopted any rules or regulations which define or specify the elements or basis of "willful or wanton misconduct" as those terms are used in I. C. 25-22.5-6-2(6), thereby bringing within the scope and ambit of said statutory provision action, activity, conduct and words of every type and form.

11. Pursuant to I. C. 25-22.5-2-7(a) and (c), the Board is required and mandated to promulgate rules and regulations to enforce the provisions of I. C. 25-22.5-6-2 and 25-22.5-6-3.

12. The provisions of I. C. 25-22.5-6-2(5) and (6) are unconstitutional in that:

a. I. C. 25-22.5-6-2(5) is vague and overbroad in that it fails to describe or identify those drugs classified as "narcotic", "addicting" or "dangerous" and brings within its ambit drugs of numerous descriptions, compositions and identities which are not, or may not be, "narcotic" or "addicting" or "dangerous"; and

b. The Medical Licensing Board of Indiana has failed and neglected to identify, designate or specify those drugs which are either "narcotic" or "addicting" or "dangerous", thereby failing to give notice of such drug classifications in violation and contravention of respondent's right to due process and notice of the charges against him; and

c. I. C. 25-22.5-6-2(6) is vague and overbroad in that the terms "willful or wanton misconduct" are insufficient to apprise a respondent of that conduct which is prohibited in direct and unmistakable terms with clearness and certainty, and brings within their ambit conduct which is permissible or otherwise constitutionally protected, thereby failing to give notice of the particular conduct which is prohibited in violation and contravention of respondent's right to due process and notice of the charges against him.

13. A hearing is scheduled to be held before the Board, whose members include five (5) physicians, one (1) osteopathic physician, and one (1) chiropractor, on Thursday, February 12, 1976, commencing at 9:00 a.m. None of the members of said Board, upon information and belief, are attorneys or are otherwise capable of making judicial determinations on the basis of legal arguments made by counsel, despite Thompson's constitutional rights to a competent judge and to due process of law.

14. Thompson seeks a declaratory judgment in that a controversy has arisen between said plaintiff and the defendants herein as relates to Thompson's constitutional rights to due process, notice of charges, and a competent judge.

15. Thompson seeks a determination and declaration of his rights, status and legal obligations to the effect that:

a. I. C. 25-22.5-6-2(5) is unconstitutional as being vague and overbroad and in that it fails to give adequate notice of proscribed conduct and fails to specify or identify drugs classified as "narcotic" or "addicting" or "dangerous"; and that

b. I. C. 25-22.5-6-2 (6) is unconstitutional as being vague and overbroad; and that

c. A hearing before non-attorney members of the Board, untrained and unfamiliar with arguments of counsel, constitutes a denial of due process in contravention and violation of the Fourteenth Amendment to the United States Constitution and of Article 1, § 12 of the Constitution of Indiana.

16. This action is prosecuted, and the declaration and determination of rights of the parties relating to the constitutionality of I. C. 25-22.5-6-2(5) and (6) is sought pursuant to the Uniform Declaratory Judgments Acts, I. C. 34-4-10-1 *et seq.*, and the plaintiff states that the plaintiff and defendants, respectively, have an interest in obtaining and securing a declaration by this court of the rights, status

and legal obligations of said parties; and plaintiff further states that, upon information and belief, no other person has any interest in these proceedings.

WHEREFORE, plaintiff, by counsel, respectfully prays that this court:

A. Enter a declaratory judgment, declaring the respective rights, status and legal obligations of the plaintiff and defendants, to the effect that:

i. I. C. 25-22.5-6-2(5) is unconstitutional as being vague and overbroad and in that it fails to give adequate notice of proscribed conduct and fails to specify or identify drugs classified as "narcotic" or "addicting" or "dangerous"; and that

ii. I. C. 25-22.5-6-2(6) is unconstitutional as being vague and overbroad; and that

iii. A hearing before non-attorney members of the Board, untrained and unfamiliar with arguments of counsel, constitutes a denial of due process in contravention and violation of the Fourteenth Amendment to the United States Constitution and of Article 1, § 12 of the Constitution of Indiana.

B. Award plaintiff costs of these proceedings.

C. Order a speedy hearing, advancing this cause on the court calendar pursuant to Trial Rule 57, Indiana Rules of Trial Procedure.

D. Grant plaintiff such further relief as this Court deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

Of Counsel:
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COUNT II

17. Plaintiff incorporates by reference herein the allegations set forth in paragraphs one through sixteen inclusive of Count I of this verified complaint.

18. After terminating the employment of prior counsel, Thompson retained the services of C. Robert Knight, an attorney duly licensed and admitted to practice law in the State of Indiana, who, by *letter* dated February 4, 1976, entered his appearance before the Board on behalf of Thompson and requested a continuance to investigate the facts, conduct necessary legal research, initiate and complete discovery, review applicable files, and determine whether the Board members were competent to hear the case or precluded from hearing the case due to bias or prejudice. On February 6, 1976, C. Robert Knight was orally informed by the Board that no continuance would be granted.

19. Thereafter, on February 9, 1976, Ronald E. Elberger, an attorney duly licensed and admitted to practice law in the State of Indiana, and C. Robert Knight filed a formal appearance in pleading form before the Board and, on February 10, 1976, filed the following pleadings with the Board:

a. Motion to Dismiss.
b. Memorandum of Law In Support of Respondent's Motion To Dismiss.
c. Motion To Disqualify Medical Licensing Board Members.
d. Memorandum of Law in Support of Motion To Disqualify Medical Licensing Board members.
e. Motion For Continuance of Hearing.

20. By letter dated February 6, 1976, a copy of which is attached hereto as Exhibit "B" and is incorporated herein by reference, and which was received by counsel on February 10, 1976, the Board informed Thompson's counsel that no continuance or postponement of the hearing scheduled for February 12, 1976, would be granted under any circumstances.

21. Counsel for Thompson have reasonable cause to believe that some or all of the defendant Board members have been provided with, or otherwise furnished with, investigative materials and information which has caused said defendant Board members to be biased and prejudiced in their judgment in the administrative proceedings against Thompson in violation and contravention of Thompson's right to process and a fair trial in a fair tribunal. In view of the imminent date of the administrative Board hearing, Thompson's counsel are precluded from completing any discovery or conducting any investigation regarding the bias or prejudice of the individual defendant Board members, thereby denying Thompson due process of law, a fair trial, and effective assistance of counsel.

22. Thompson has been, and is being, wrongfully and unconstitutionally subject to disciplinary proceedings before the Board under unconstitutional provisions of I. C. 25-22.5-6-2(5) and (6), and is, therefore, being wrongfully subjected to imminent loss, damage and harm of protected interests.

23. The denial to counsel by the Board and its members of the opportunity to conduct discovery and investigation regarding the factual basis of the administrative Board charges, and regarding the bias and prejudice of the administrative Board members in administrative proceedings constitutes a denial of Thompson's right to due process as guaranteed by Article 1, § 12 of the Constitution of Indiana and by the due process clause of the Fourteenth Amendment to the United States Constitution.

24. Unless this Court enjoins the defendants from proceeding with the administrative Board disciplinary proceedings scheduled for February 12, 1976, Thompson will suffer irreparable harm, injury and damage in that:

a. Thompson will be denied due process of law and effective assistance of counsel by reason of appearing before an administrative Board whose members are non-attorneys, unfamiliar with, and untrained to, understand arguments of counsel; and in that

b. Thompson will be denied due process of law by reason of the imminent hearing date which precludes counsel from developing, acquiring or obtaining, through discovery, evidence of bias and prejudice of the Board members before whom Thompson must appear; and in that

c. Thompson will be denied due process of law by reason of the unconstitutionality of the statutory provisions set forth in I. C. 25-22.5-6-2(5) and (6) with whose violation he is charged, which provisions failed to give notice of proscribed conduct and are so vague and overbroad as to be invalid; and in that

d. Thompson will be denied due process of law by reason of the Board's failure to inform Thompson of the essential facts which constitute the bases of the charges against him; and in that

e. Counsel for Thompson is precluded from conducting discovery relating to the charges against Thompson, the background of persons who are scheduled to appear as witnesses before the Board, or any matter of defense due to the imminent hearing date, thereby denying Thompson due process of law and effective assistance of counsel.

WHEREFORE, plaintiff, W. Turton Thompson, by counsel, respectfully prays that this Court:

A. Issue a *temporary restraining order* enjoining, prohibiting and restraining the defendants, Indiana Medical Licensing Board, and Ernest R. Beaver, James N. Hamp-

ton, Robert R. Kopecky, John H. Mader, Walter J. Beneville, Bruce C. Brink and Edward L. Hollenberg, individually and as members of the Medical Licensing Board of Indiana, their agents, servants, employees, successors in office, and all persons in active concert and participation with them from:

i. Proceeding with the administrative disciplinary proceeding regarding W. Turton Thompson scheduled for February 12, 1976, at 9:00 a.m. until further order of this Court; and from

ii. Precluding counsel for W. Turton Thompson from initiating, conducting and completing discovery regarding permissible subjects of discovery prior to any administrative Board hearing in which W. Turton Thompson is the respondent.

B. Issue a preliminary and permanent injunction enjoining, prohibiting and restraining the defendants, Indiana Medical Licensing Board, and Ernest R. Beaver, James N. Hampton, Robert R. Kopecky, John H. Mader, Walter J. Beneville, Bruce C. Brink and Edward L. Hollenberg, individually and as members of the Medical Licensing Board of Indiana, their agents, servants, employees, successors in office, and all persons in active concert and participation with them from:

i. Enforcing the provisions of I. C. 25-22.5-6-2(5) and (6); and, from, or in the alternative, from

ii. Proceeding with the conduct of any administrative hearing before the Medical Licensing Board of Indiana in which W. Turton Thompson is a respondent prior to (a) the completion of reasonable discovery by counsel for said respondent in said administrative proceedings, and (b) a determination of the issues of bias and prejudice presented to said Board after hearing thereupon, and (c) consideration and determination of all preliminary motions filed by said respondent.

C. Award plaintiff costs of these proceedings.

D. Grant plaintiff an immediate hearing upon his application for temporary restraining order, and schedule a prompt hearing upon plaintiff's prayer and application for preliminary injunction.

E. Grant plaintiff such further relief as this Court deems just and proper.

Respectfully submitted,

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Of Counsel:
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(317) 634-2200

STATE OF INDIANA, County of Marion

EXHIBIT "A"

BEFORE THE MEDICAL LICENSING BOARD
OF INDIANA

IN RE: Revocation of License of Walter Turton Thompson, M.D. to practice medicine, surgery and obstetrics being License No. 18462.

Robert R. Kopecky, M.D., affiant being duly sworn upon his oath says:

That he is a resident of Marion County, in the State of Indiana. That heretofore, to-wit, upon the 6th day of May,

1957 one Walter Turton Thompson, M.D., then of Clark County, in the State of Indiana, filed with the Medical Licensing Board of Indiana, his application for a license to practice medicine, and subsequently, upon the 11th day of September, 1958, a license to practice medicine in the State of Indiana was duly issued to him by said Board, being License No. 18462.

That the said Walter Turton Thompson, M.D. is now a resident of Clark County, and said license by said Board is still in force and effect.

That said Walter Turton Thompson, M.D. has been guilty of violations of Acts 1975, Public Law 271, to wit:

1. Illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2 (5), Chapter 6 of Acts 1975, Public Law 271.
2. Willful and wanton misconduct in the practice of medicine by illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to femal patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2 (6), Chapter 6 of Acts 1975, Public Law 271.

WHEREFORE, affiant prays that the license of said Walter Turton Thompson, M.D. to practice medicine in said State be revoked, suspended or placed on probation.

Robert R. Kopecky, M.D.

Subscribed and sworn to before me this 23rd day of October, 1975.

Joseph D. O'Brian, Adm.

My Commission expires April 14, 1977.

Exhibit "B"

Received 2-10-76
CERT. MAIL #149062 February 6, 1976
Walter T. Thompson, M.D.
1403 Youngstown Drive
Jeffersonville, Indiana 47130
Dear Dr. Thompson:

Please be advised that the Medical Licensing Board of Indiana will proceed to hear the case of Medical Licensing Board of Indiana VS Walter T. Thompson, M.D., on February 12, 1976 at 9:00 A.M. in Room 25 of the State Board of Health Annex at 1375 W. 16th Street, Indianapolis, Indiana as previously agreed to by your former counsel, Mr. Ronald Fifer, and this Board.

Due to your having been granted two previous continuances, this Board must deny your new counsel's request for another continuance and proceed with the hearing on February 12, 1976.

Sincerely,
MEDICAL LICENSING BOARD OF INDIANA
Robert R. Kopecky, M.D., Secretary

RRK/db
cc: Robert Knight
Eric Wyndham

FEDERAL STATUTES

42 U. S. C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U. S. C. § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

79-2068

IN THE

Supreme Court of the United States

October Term, 1979

No. ———

W. TURTON THOMPSON,

Petitioner,

v.

MEDICAL LICENSING BOARD OF INDIANA and ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, and EDWARD L. HOLLENBERG, Individually and as Members of the Medical Licensing Board of Indiana,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, SECOND DISTRICT

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IN THE

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MEDICAL LICENSING BOARD OF INDIANA and ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, and EDWARD L. HOLLENBERG, Individually and as Members of the Medical Licensing Board of Indiana,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, SECOND DISTRICT

STATUTES INVOLVED

The statutes involved in this case are 42 U.S.C. §§ 1983 and 1988 which are set out in the Appendix at A43 of Petitioner's Brief and Indiana Code §§ 4-22-1-1, 4-22-1-3, 4-22-1-14 and 25-22.5-6-2(5)(6) as more fully set forth in Appendix A1, and A3.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Indiana Court of Appeals properly applied Indiana law in comport with Federal law to a cause

of action pursuant to 42 U.S.C. § 1983 requiring that Plaintiff exhaust his administrative remedies before being entitled to seek judicial review?

2. Whether the Plaintiff is required to exhaust his state administrative remedies where he challenges the alleged non-impartiality of the Medical Board's *in futuro* hearing before seeking judicial review under 42 U.S.C. § 1983?

STATEMENT OF THE CASE

This case started in October 23, 1975, when the Indiana Medical Licensing Board (the "Board") instituted disciplinary proceedings against Dr. Turton W. Thompson ("Thompson"), charging him with violations of I.C. 25-22.5-6-2(5) and (6), which provide:

> To promote uniformity among the several states and territories and to provide guidelines for physicians and the board, the following charges will be grounds for probation of a licensee or suspension or revocation of a license:
>
> • • •
>
> (5) Except as otherwise permitted by law, to knowingly prescribe, sell or administer any drug classified as a narcotic, addicting or dangerous drug to a habitue or addict;
>
> (6) Willful or wanton misconduct or manifest incapacity in the practice of medicine or osteopathic medicine.

Thompson is alleged to have violated this statute by providing prescription drugs to female patients in return for sexual favors. The Board's charge against Thompson alleged he had violated I.C. 25-22.5-6-2(5) and (6) by:

> 1. Illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and

quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2(5), Chapter 6 of Acts 1975, Public Law 271. [IC 25-22.5-6-2(5).]

2. Committing willful and wanton misconduct in the practice of medicine by illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2(6), Chapter 6 of Acts 1975, Public Law 271. [I.C. 25-22.5-6-2(6)]

The Board chose to proceed against Thompson by scheduling an administrative disciplinary hearing for Thursday, February 12, 1976, commencing at 9:00 a.m. This hearing would be before the Board which includes as its members five (5) physicians, one (1) osteopathic physician, and one (1) chiropractor.

One day prior to the Board hearing Thompson brought suit to restrain the Board. The case was commenced in the Marion Superior Court, Room Seven, on February 11, 1976 seeking injunctive and declaratory relief against the Board pursuant to 42 U.S.C. § 1983 and certain Indiana statutes. Thompson sought to restrain the Board from initiating the administrative proceedings against him.

On June 14, 1976, Judge Zore of Marion Superior Court, Room Seven, granted the Board's motion to dismiss the complaint on the grounds that Thompson, by failing to proceed with the Board disciplinary hearing, had failed to exhaust state administrative remedies. The relevant portion of Judge Zore's order provided:

> ORDERED that defendants' motion to dismiss be, and is hereby, GRANTED upon the ground that the plaintiff has failed to exhaust his administrative remedies before the Medical Licensing Board of Indiana. Accordingly, it is the judgment of this Court that plaintiff's verified complaint be, and is hereby, DISMISSED, each party to bear its own costs in the action.

Thompson perfected an appeal from this decision and the trial court, pursuant to Thompson's motion, granted an injunction and stay of any Board action pending appeal.

On April 25, 1979, the Indiana Court of Appeals, Second District, affirmed the dismissal of the complaint in an opinion reported at 389 N.E.2d 43. This opinion held that judicial review of administrative decisions under the Indiana Administrative Adjudication Act, I.C. 4-22-1, provided the exclusive means to obtain judicial relief from the Indiana administrative process and that exhaustion of any administrative proceedings was required prior to seeking judicial relief.

On May 11, 1979, Thompson petitioned the Court of Appeals for rehearing, raising as the basis for this petition the failure of the Court of Appeals to address the issue of exhaustion under 42 U.S.C. § 1983. The Court of Appeals denied this petition, in an opinion dated December 26, 1979, and reported at 398 N.E.2d 679, holding, in relevant part, as follows:

> "No case cited by Thompson, nor any which we have been able to locate, demands that a state court abandon its own requirements of exhaustion merely because the claim before it is based upon § 1983.
>
> Language in the federal decisions so indicates. In *Snyder v. Altman, supra,* the court stated:

> The general rule is that there is no need to exhaust possible state remedies before pursuing a civil rights action *in federal court.* (emphasis supplied)

444 F.Supp. at 1270.

Likewise, the court in *Kahn v. Shainswit, supra,* remarked:

> [Our decision] does not violate the general rule that *a federal litigant* need not exhaust state remedies in a § 1983 action. (emphasis supplied).

414 F.Supp. at 1068.

Thus we repeat, a state court does not undergo a metamorphosis into a federal court merely because it must decide a § 1983 suit.

Thompson sought transfer of his case to the Indiana Supreme Court by petition dated January 4, 1980. This petition was denied on April 3, 1980, terminating the litigation between the parties in the Indiana courts.

REASONS FOR DISALLOWANCE OF THE WRIT

1. The Decision Below Merely Determined Jurisdiction of The State Court, Thus No Substantial Federal Question Was Presented.

42 U.S.C. § 1983 unto itself is not a jurisdictional statute and does not confer or expand upon the jurisdiction of either federal or state trial courts. This is clearly enunciated in *Gonzales v. Young,* 560 F.2d 160 (1977) at p. 164.

> "Section 1983 provides for a federal cause of action to redress the deprivation, under color of state law, of any rights, privileges, or immunities secured by the Constitution and laws.
>
> . . . . "We hold that it is not a jurisdictional

> statute; it only fashions a remedy. Thus, although Gonzales may have asserted a claim under Section 1983, she had to look to other authority to obtain jurisdiction."

Affirmed — U.S. —, 99 S.Ct. 1905 (1979). In the instant case petitioner chose the Indiana State Courts as his forum and thus was mandated to comply with Indiana state jurisdictional requirements. The Indiana Court of Appeals in its published opinion reported at 398 N.E.2d 679, stated that if the administrative remedy had not been exhausted then a state court did not have jurisdiction to take action.[1]

Under Indiana law exhaustion of administrative remedies is a jurisdictional requirement whose judicial boundaries are not expanded by 42 U.S.C. § 1983. Thus the Indiana Court of Appeals was correct in holding that the Indiana state trial court was without jurisdiction to hear petitioner's case due to petitioner's failure to exhaust administrative remedies as required under state law.

Each state retains the right to determine its own court's jurisdictional requirements through application of state law. The jurisdictional procedures provided under state administrative law are not patently offensive to federal due process rights therefore no right to judicial review existed in state courts until the administrative procedures utilized to find the facts are exhausted. Determination by judicial review of any alleged bias in the administrative process is a factual issue whose review as to any alleged

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[1] *State ex rel. Indianapolis Water Co. v. Boone Circuit Court* (1974) 261 Ind. 583, 307 N.E.2d 870; *Indianapolis Power & Light Co. v. Highland Realty Co.* (1970) 253 Ind. 637, 256 N.E.2d 94; *State ex rel. Public Service Commission v. Marion Circuit Court* (1961) 242 Ind. 145, 177 N.E.2d 397; *Amburgey v. Miller* (1977) — Ind. App. —, 362 N.E.2d 869; *Indianapolis Bell Telephone Co. v. Friedland* (1978) — Ind. App. —, 373 N.E.2d 344.

constitutional violations arising therefrom is provided for under I.C. 4-22-1-14.

Gibson v. Berryhill, 411 U.S. 564 (1973), relied upon by the petitioner, involved an action filed by the aggreived parties in federal district court where federal jurisdictional requirements are applicable. However, federal jurisdictional requirements are not applicable to a cause of action filed in state court where state jurisdictional requirements are not patently offensive to the constitutional rights of this petitioner.

Rule 17 of the Rules of this Court provides for a writ of certiorari to a state court where that court has rendered an opinion which is in conflict with applicable decisions of this Court or other federal courts of appeal. The Indiana Court of Appeals, with due regard for both the preservation of unfettered action by administrative agencies operating within the sphere of their authority and protection of Petitioner's constitutional rights under 42 U.S.C. § 1983, properly held that Petitioner was required to exhaust his administrative remedies under I.C. 4-22-1-1, I.C. 4-22-1-3 and I.C. 4-22-1-14. The Indiana Court of Appeals found that judicial review of orders, decisions or determinations rendered by an administrative agency, alleged to be contrary to constitutional rights, duties or privileges, was specifically incorporated into Indiana statutory law and judicial adjudications thereof.[2]

As the Indiana Court of Appeals demonstrated in citing the *Paynter* case, *id,* not only may final determinations of

[2] The exclusivity of judicial review subsequent to exhaustion of administrative remedies was clearly enunciated in *State ex rel. Paynter v. Marion County Superior Court, Room No. 5* (1976), — Ind. —, 344 N.E.2d 846, 851; *Public Service Commission of Indiana et al. v. City of Indianapolis* (1956), 235 Ind. 70, 83, 131 N.E.2d 308, 313; *Indiana Alcoholic Beverage Commission v. McShane* (1976), — Ind. App. —, 354 N.E.2d 259.

an administrative agency be subjected to judicial review but also so may findings of fact be so subjected. Generally, however, judicial review is denied for lack of finality if an action by an administrative agency is only anticipated. *Downing v. Bd. of Zoning Appeals* (1971), 149 Ind. App. 687, 274 N.E.2d 542; *State of New York v. United States,* 568 F.2d 887 (2d Cir., 1977). In the administrative law context, a claim is ripe for pre-enforcement judicial consideration only if (1) the issues presented are purely legal, (2) the issues arise out of a final agency action . . . (4) the litigation will expedite final resolution rather than delay or impede effective agency enforcement. *Pennzoil v. Department of Energy,* 466 F.Supp. 238, 241 (D.C. Del., 1979). *Rochester Telephone Corp. v. United States,* 307 U.S. 115 (1939).

The policies underlying the doctrine of exhaustion of administrative remedies are similar to those underlying the ripeness doctrine, to-wit: ensuring development of a full factual record before decision, allowing for the application of administrative expertise to the factual record as developed and promoting judicial efficiency in the resolution of controversies. *Pennzoil, Id.*

In *Plano v. Baker,* 504 F.2d 595 (2d Cir., 1974) and *Metcalf v. Swank,* 444 F.2d 1353 (7th Cir., 1971), the United States Court of Appeals held that an administrative procedure adequate to require exhaustion prior to commencing suit under 42 U.S.C. § 1983 to vindicate the interference with a constitutional right would include: the right to hear and refute evidence presented against one's self, the right to present evidence on one's behalf, the right to call witnesses on one's behalf and the right to an impartial tribunal. Clearly, application of the Indiana Administrative procedure through its statutorily provided adjudicatory

levels would give Petitioner the constitutional safeguards which he now seeks.

All of Petitioner's cases cited in support of the proposition that administrative remedies need not be exhausted where a 42 U.S.C. § 1983 violation is alleged originate from a lower federal court adjudication not a state court. Petitioner chose the state court as his forum and further chose to challenge the constitutionality of I.C. 25-22.5-6-2(5) and (6). The right to practice medicine is a conditional right which is subordinate to the state's power and duty to safeguard the public health, and it is the universal rule that in the performance of such duty and in the exercise of such power, the State may regulate and control the practice of medicine and those who engage therein, subject only to the limitation that the measures adopted must be reasonable, necessary and appropriate to accomplish the legislature's valid objective of protecting the health and welfare of its inhabitants. It is beyond dispute that the power of the State to regulate the practice of medicine includes the power to create an administrative board and vest in it the supervision of such regulation. *Geiger v. Jenkins,* 316 F.Supp. 370, 373 (1970), *cert. denied* 91 S.Ct. 1236. The doctrine of exhaustion of administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed civil administrative remedy has been exhausted. Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. *McKart v. United States,* 395 U.S. 185 (1969); *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938).

Respondent would strongly urge that the Indiana Court of Appeals proprietously applied Indiana law to a matter of

public health and welfare within its borders; to-wit: the licensing and regulation of medical doctors within its borders. The Indiana Administrative Adjudication Act provides for judicial review of alleged violations of constitutional rights and immunities as well as for arbitrary or capricious acts which might occur throughout the administrative review process.

Unequivocally, Petitioner's claim for relief under 42 U.S.C. § 1983, in the case at bar, is unripe for adjudication by this Court and is a subterfuge to avoid the prescribed state jurisdictional requirements and state administrative remedies. *Lake Carriers Association v. MacMullan,* 406 U.S. 498 (1972). Thus, no writ should issue unless and until the administrative process, including judicial review, is final; particularly since there has not even been an initial determination by the Medical Review Board in the case at bar.

2. Plaintiff Is Required to Exhaust His Administrative Remedies Where Bias Is Alleged Before Bringing Suit Under 42 U.S.C. § 1983.

This Court has consistently held that the mere allegation of non-impartiality in an adjudicatory proceeding so as to promulgate a claim under 42 U.S.C. § 1983 does not automatically relieve a plaintiff from the burden of exhausting his administrative remedies prior to instituting suit. Plaintiff's reliance upon *Gibson v. Berryhill,* 411 U.S. 564, 581 (1973), is misplaced in that the facts therein are clearly distinguishable from the ones in the case at bar. In *Gibson,* the Alabama Board of Optometry instituted suit in federal court on the same charges which comprised the subject matter of the state administrative proceeding; to-wit: whether the Lee Optical Company's employment of

licensed optometrists constituted a corporation practicing optometry. The bias alleged to be present in *Gibson* was of a type deemed particularly suspect in light of § 1983; board members stood to become financial heirs to customers who would no longer be able to utilize the services of the suspended practitioners. In the case at bar, there has been no showing that Robert Kopecky, the complainant and Board member had any personal financial stake in the outcome of the administrative hearings. In *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), this Court in a factual setting, almost indistinguishable from the one at bar, held that the type of bias justifying federal intervention under § 1983 arose where the adjudicator had a pecuniary interest in the outcome and the adjudicator had been the target of personal abuse or criticism from the party before him. This Court held that there is a presumption of honesty and integrity in an adjudicator and any party challenging same under the contention of non-impartiality due to performance of investigative and adjudicatory functions had a difficult burden of persuasion to carry.[3] I.C. 25-22.5-6-3.

As more fully set forth *supra*, the Indiana Administrative Adjudication Act provides adequate constitutional safeguards against alleged bias so as to require exhaustion of state remedies prior to bringing a suit under § 1983. To permit adjudication of the constitutional claim would leave unresolved the misconduct charges against the petitioner resulting in piecemeal review and the potential for indeterminate delay. Thus, a writ should be denied.

---

[3] . . . It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.

CONCLUSION

The decision below proprietously applied Indiana law as a jurisdictional bar to a cause of action arising under 42 U.S.C. § 1983. With sufficient constitutional safeguards set forth in the Indiana statutes governing Administrative adjudication and judicial review thereof, a writ should not issue in this cause.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM E. DAILY
Chief Counsel/Staff

JEFFREY G. FIHN
Deputy Attorney General

Attorneys for Respondents.

APPENDIX

4-22-1-1 [63-3001]. Intent of act.—It is the intent to establish a uniform method of administrative adjudication by all agencies of the state of Indiana, to provide for due notice and an opportunity to be heard and present evidence before such agency and to establish a uniform method of court review of all such administrative adjudication. [Acts 1947, ch. 365, § 1, p. 1451.]

4-22-1-3 [63-3003]. Determination of rights, duties, obligations, privileges or other legal relations by agencies.— In every administrative adjudication in which the rights, duties, obligations, privileges or other legal relations of any person are required or authorized by statute to be determined by any agency the same shall be made in accordance with this act [4-22-1-1—4-22-1-30] and not otherwise. [Acts 1947, ch. 365, § 3, p. 1451.]

4-22-1-14 [63-3014]. Judicial review — Courts — Procedure. — Any party or person aggrieved by any order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act [4-22-1-1—4-22-1-30]. Such review may be had by filing with the circuit or superior court of the county in which such person resides, or in any county in which such order or determination is to be carried out or enforced, a verified petition setting out such order, decision or determination so made by said agency, and alleging specifically wherein said order, decision or determination is:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or

(2) Contrary to constitutional right, power, privilege or immunity; or

(4) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or

(4) Without observance of procedure required by law; or

(5) Unsupported by substantial evidence.

Said petition for review shall be filed within fifteen [15] days after receipt of notice that such order, decision or determination is made by any such agency. Notice shall be given in the manner prescribed by section 6 [4-22-1-6] of this act. Unless a proceeding for review is commenced by so filing such petition within fifteen [15] days any and all rights of judicial review and all rights of recourse to the courts shall terminate.

Written notice of the filing of such verified petition for review and a copy of said petition shall be personally served upon the agency and the attorney-general. Where the agency consists of more than one member it shall be personally served upon the secretary or chairman of such agency.

Any party or person so filing such verified petition for review with such court shall within fifteen [15] days thereafter secure from such agency a certified copy of the transcript of said proceedings before the agency including the order or administrative adjudication sought to be review and file the same with the clerk of such court in which such action for review is pending. An extension of time in which to file such transcript shall be granted by said court in which such action for review is pending for good cause shown. Inability to obtain such transcript within time shall be good cause. Failure to file such transcript within said period of fifteen [15] days, or to secure an extension of time therefor, shall be cause for the dismissal of such petition for review by the court or on petition of any party of record to the original proceeding. Where more than one person may be aggrieved by the administrative adjudication only one [1] proceeding for review may be had and the court in which a petition for review is first property filed shall have jurisdiction. All persons who were parties to the hearing before the agency shall be made parties to the petition for view and shall be notified thereof by the person filing such petition. [Acts 1947, ch. 365, § 14, p. 1451; 1957, ch. 355, § 4, p. 1033.]

25-22.5-6-2. Probation — Suspension — Revocation. — To promote uniformity among the several states and territories and to provide guidelines for physicians and the board, the following charges will be grounds for probation of a licensee or suspension or revocation of a license:

(1) The use of any false, fraudulent or forged statement or document, or the use of any fraudulent, deceitful, dishonest or immoral practice in connection with any of the licensing or permit requirements;

(2) The acts from which a felony conviction resulted, if the acts have a direct bearing on whether or not the person should be entrusted to serve the public as a licensed physician;

(3) Currently using or consuming a drug or intoxicant so as to render the licensee unsafe or unfit to practice medicine or osteopathic medicine;

(4) Suffering from a mental or physical disability so as to render the licensee unsafe or unfit to practice medicine or osteopathic medicine;

(5) Except as otherwise permitted by law, to knowingly prescribe, sell or administer any drug classified as a narcotic, addicting or dangerous drug to a habitué or addict;

(6) Wilful or wanton misconduct or manifest incapacity in the practice of medicine or osteopathic medicine;

(7) The practice of medicine or osteopathic medicine under a false or assumed name;

(8) The willful performance of an act likely to deceive or harm the public; or

(9) The suspension or revocation by another state of a license to practice medicine based upon acts by the licensee similar to acts described in this section. A certified copy of the record of suspension or revocation is conclusive evidence of the other state's suspension or revocation. [I.C. 25-22.5-6-2, as added by Acts 1975, P.L. 271, § 1; 1979, P.L. 246, § 2.]

25-22.5-6-3. Disciplinary proceedings. — (a) Proceedings for the probation of a licensee or a permit holder or

the revocation or suspension of any license or permit to practice medicine or osteopathic medicine in Indiana must be commenced by the filing of written verified charges with the secretary of the board. These charges may be filed by any resident of Indiana, or by the secretary or any member of the board upon information from whatever source in his possession, which causes the member to have reasonable cause to believe that the matter should be filed and placed before the board for its determination. Proceedings for probation of a licensee or permit holder or revocation or suspension of any license or permit to practice medicine or osteopathic medicine in Indiana must be conducted according to the administrative adjudication act of Indiana, I.C. 4-22-1 [4-22-1-1—4-22-1-30]. Approval by a majority of all members of the board shall be required for any action to be taken.

(b) Any person who files charges or testifies before the board in any disciplinary proceeding is immune from civil liability for damages for any sworn or written testimony made with probable cause and without malice.

(c) The administrator, his staff, counsel, investigators, hearing officers, and the board members are immune from civil liability for damages for conduct within the scope and arising out of the performance of their duties. [I.C. 25-22.5-6-3, as added by Acts 1975, P.L. 271, § 1, p. 1501; 1977, P.L. 172, § 28, p. 749.]

Supreme Court, U. S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2068

W. TURTON THOMPSON,

Petitioner

vs.

MEDICAL LICENSING BOARD OF INDIANA AND ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, AND EDWARD L. HOLLENBERG, INDIVIDUALLY AND AS MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA,

Respondents

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, SECOND DISTRICT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2068

W. TURTON THOMPSON,

Petitioner

vs.

MEDICAL LICENSING BOARD OF INDIANA AND ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, AND EDWARD L. HOLLENBERG, INDIVIDUALLY AND AS MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA,

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ARGUMENT

Respondents' "Brief in Opposition to Petition for Writ of Certiorari to the Indiana Court of Appeals, Second District," (hereinafter "Opposition Brief"), raises two points warranting reply. First, the Opposition Brief suggests that a state remains free to apply its own jurisdictional requirements to a cause of action arising under a federal statute, such as 42 U.S.C. § 1983, if that requirement is "not patently offensive to federal due process rights." (Opposition Brief, p. 6) Second, the Opposition Brief claims that this case is governed by *Withrow v. Larkin,*

421 U.S. 35 (1975), and, therefore, does not state a viable claim under § 1983. Neither of these arguments, however, adequately addresses the points made in the petition for writ of certiorari (hereinafter "Petition").

I.

A State Court Must Follow This Court's Rulings Interpreting a Federal Statute

The Opposition Brief fails to acknowledge that the decisions of this Court control the questions presented in this case, which arises under a federal statute, even though the case was filed in state court. Thus, the Opposition Brief cites numerous Indiana decisions generally requiring exhaustion of administrative remedies and ignores the decisions of this Court which have eliminated the exhaustion requirement in § 1983 cases such as this one. The Opposition Brief claims that it may ignore this Court's decisions because a state is allowed to apply its own jurisdictional requirement to a case, regardless of whether that case arises under a federal statute, if the jurisdictional requirement is "not patently offensive to federal due-process rights." It is interesting to note that the Opposition Brief cites no cases supporting that proposition.

The absence of supporting precedent is not surprising, however, because, as shown by the cases cited in the Petition (pp. 12-14), federal law, as interpreted and applied by this Court, must be applied to federal rights arising under federal statutes even when those rights are enforced in state court. The numerous decisions of this Court cited in the Petition (pp. 14-16), particularly *Gibson v. Berryhill*, 411 U.S. 564 (1973), hold that exhaustion of administrative remedies is not required under the circumstances presented in this § 1983 action. The court below chose not to follow this Court's decision, and it is this refusal to acknowledge the primacy of the law developed by this Court which gives rise to the Petition.

This Court has previously held that state practices and procedures, no matter how dearly held, must give way when they are inconsistent with the federal law to be applied in determining federal substantive rights. Typical of these cases are *Dice v. Akron, Canton and Youngstown Railroad Company,* 342 U.S. 359 (1952) and *Brown v. Western Railway of Alabama,* 338 U.S. 294 (1949) in which this Court granted certiorari and reversed two state court determinations in Federal Employees' Liability Act ("FELA") cases.

In both *Dice* and *Brown,* state courts had applied well-established state rules of law to FELA actions.[1] In both cases, this Court granted certiorari to determine whether the state law rule could be applied to a federal cause of action. And in both cases, this Court reversed the decisions of the state court and held that "[s]tate laws are not controlling in determining what the incidents of this federal right shall be." *Dice, supra,* 342 U.S. at 361.

The Petition presents substantial questions of federal law similar to those which have previously led this Court to grant certiorari to review state court decisions. For example, in *Brown, supra,* this Court granted certiorari "because the implications of the dismissal were considered important to a correct and uniform application of the federal act in state and federal courts," 338 U.S. at 295. The dismissal of the complaint here for failure to exhaust administrative remedies presents similar issues regarding the uniform application of § 1983 in state and federal courts. The court below acknowledged, but did not follow, the decisions of this Court which relieve petitioner of the requirement of exhausting state administrative remedies before proceeding under § 1983. Certiorari should be

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[1] In *Brown,* the complaint was dismissed based on a state rule which required the allegations of the complaint to be construed against the plaintiff. In *Dice,* the judge reversed a jury verdict under an Ohio practice which removed certain fraud question from the jury's determination.

granted in this case to insure the uniform application of § 1983 in state and federal courts, and to correct the failure of the Indiana Court of Appeals, Second District, to apply the federal law developed by this Court under that federal statute.

II.

The Complaint's Allegations of Bias Relieve Plaintiff of The Requirement of Exhausting Administrative Remedies

The second part of the Opposition Brief suggests that exhaustion of administrative procedures is required here even though the complaint below alleges bias in the administrative process. The Opposition Brief relies heavily on *Withrow v. Larkin,* 421 U.S. 35 (1975) claiming that the case is "almost indistinguishable from the one at bar" (Opposition Brief, p. 11). This argument ignores, however, the clear language in *Withrow,* cited at pp. 19-20 of the Petition, which requires a lower court to make a careful inquiry into allegations of bias in the administrative process before dismissing a § 1983 action.

The complaint's allegations of bias extend far beyond the mere combination of the investigative-adjudicative function presented in *Withrow.* Here the Complaint alleges, *inter alia,* that information was provided to members of the Medical Licensing Board prior to the scheduled hearing which prejudiced their ability to impartially review the case.[2] No similar allegations appear in *Withrow* thus distinguishing the present case from *Withrow* and precluding dismissal for failure to exhaust administrative remedies prior to judicial investigation into the bias claim contained in the Complaint.

Furthermore, in *Withrow,* which, as here, involved a doctor attempting to restrain a medical licensing board hearing to revoke his license, neither the three-judge court

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[2] Complaint, paragraph 21, page A37 of the Petition.

nor this Court even suggested that Withrow was required to exhaust the licensing board hearing before presenting his due process claim pursuant to § 1983. Whatever *Withrow* might say about the merits of petitioner's claim, it at least supports petitioner's right to have his claim heard on its merits, free from the exhaustion requirement.

Thus, for the reasons stated on pages 16-20 of the Petition, the decision below conflicts with *Gibson, supra,* is distinguishable from *Withrow,* and, therefore, certiorari should be granted to correct the conflict between *Gibson* and the decision below.

Conclusion

For the reasons stated herein, and in the Petition, Petitioner, W. Turton Thompson, prays that a writ of certiorari issue to the Indiana Court of Appeals, Second District, to review the judgment and opinion below.

Respectfully submitted,

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